California Department of Transportation

Caltrans Position Paper for the Dispute Review Board

Regarding

Notice of Potential Claim No. 10,

Temporary 1% Increase in Statewide Sales and Use Tax

for the

Oakland Touchdown Project

Contract No. 04-0120L4

Date: January 29, 2010

Contractor: **MCM Construction, Inc.**

Senior Resident Engineer: **Ben Ghafhgazi, P.E.**

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DESCRIPTION OF THE DISPUTE

Contractor is requesting additional compensation for costs incurred due to a temporary 1% increase in the statewide Sales and Use Tax. (See AB 3 (Evans)) The California Department of Transportation (Department) has rejected the claim because the Department finds no law, statute, regulation, or contractual provision obligating it to pay such costs. Also, a California Judicial Court has already determined the State has no obligation to pay such costs.

NOTIFICATION

Contractor submitted the Initial NOPC No. 10 on April 8, 2009.

GENERAL BACKGROUND OF THE DISPUTE

Assembly Bill 3 (Evans) has five revenue-raising provisions that were necessary to implement the special session budget agreement reached in January 2009. One of the provisions temporarily increased the rate of the general fund portion of the state's sales and use tax by 1 percent, i.e. from 5% to 6%. The increase took effect on April 1, 2009 and will sunset on June 30, 2011.

The Bids for 04-0120L4 were opened on June 5, 2007, the Contract was awarded on July 16, 2007, the Contract was approved on August 07, 2007 and field work began on August 22, 2007. AB 3 was enacted on April 1, 2009 after the bids were opened and after the Contract was already awarded.

This law imposes a sales or use tax on the sale or use in California of tangible personal property. The tax increase also applies to merchandise previously ordered and paid for under existing contracts in which the customer was not yet in physical possession or holder of title as of April 1, 2009.

Public works contracts are fixed-price contracts. Although statutes increasing the state sales tax in 1990 and 1991, both had specific language exempting fixed-price contracts from payment of increased sales tax. Assembly Bill 3, did <u>not</u> exempt fixed price contracts from the payment of increased sales and use tax. The contractor is requesting additional compensation due to increased costs to the project for complying with this law.

CONTRACTOR'S POSITION

Excerpts from the letter which was attached to the initial notice of potential claim as the Contractor's position regarding the particular nature, circumstances, and basis of this potential claim, the Contractor offers the following arguments:

Section 4-1.03(c), "Changes," of the Standard Specifications allows the Department to make changes to the plans and specifications and to adjust compensation to the contractor accordingly. The passage of AB3 increased the state tax 1.00%, thus at bid time MCM could not have reasonably anticipated the additional costs necessary to complete the project once they were subject to the increased sales and use tax.

Although, Section 7-1.03, "Payment of Taxes," states that full compensation to the contractor for all taxes is included in the contract prices, it does not mean that the

contractor necessarily bears the risk of paying for the cost of compliance. Additionally, Section 9-1.02 requires the contractor only to assume the risk of unforeseen difficulties in the work "contemplated and embraced" by the contract. The 1% increase in the sales and use tax was not "contemplated or embraced under the contract."

Increased sales and use tax costs as directed by the State constitute a change in the contract provisions; therefore the State should compensate the contractor for changes in tax rates.

There is no affect on the scheduled project completion.

AUTHORITY OF THE DRB TO DECIDE THE DISPUTE

This is an issue that is external to the contract.

The dispute did not arise from performance of the contract, but rather as a result of the independent governmental action of the legislature of the State of California (i.e. a sovereign act). The Contractor is required to pay its taxes to the California Board of Equalization, not the Department. The Department does not collect or refund taxes. The Contractor's claim is, therefore, misguided as it applies to the Department.

While respecting the Contractor's contractual responsibility to conform to the specified dispute procedures to advance this notice of potential claim, and further respecting the DRB's contractual requirement to hear the disputes referred to them, the Department disagrees with the DRB's contractual authority to decide this dispute because it involves solely legal interpretations which are not properly within the scope of the DRB's obligations as follows:

Special Provisions Section 5-1.12, "Dispute Review Board," subsection "General" states, *"To assist in the resolution of disputes or potential claims arising out of the work of this project, a Dispute Review Board...shall be established by the Engineer and the Contractor...."*

Standard Specifications Section 9-1.04, "Notice of Potential Claim," as amended in Special Provisions allows the Contractor to submit an INOPC *"For disputes arising under and by virtue of the contract, including an act or failure to act by the Engineer."*

Special Provisions Section 5-1.12, "Dispute Review Board," subsection "Selection Process, Disclosure and Appointments" states, *"The Contractor, the State and the 3 members of the DRB shall complete and adhere to the Dispute Review Board Agreement in administration of this DRB...."*

The DRB Agreement, Section II, "Scope of Work," subsection A, "Objective," states, *"The principle objective of the DRB is to assist in the timely resolution of disputes between the parties arising from the performance of the contract."*

The DRB Agreement, Section II, "Scope of Work," subsection B, "Procedures," states, *"The DRB shall render written reports on disputes between the parties arising from the construction contract."*

The contract and the DRB Agreement, both documents to which all three of the parties are bound, are consistent in stating that the DRB is to consider disputes that arise "under and by virtue of the contract" or "out of the contract." This issue was prompted by a separate, independent action from outside this contract.

Special Provisions Section 5-1.12, "Dispute Review Board," subsection "Selection Process, Disclosure, and Appointments" states, *"DRB members shall be especially knowledgeable in the type of construction and contract documents potentially anticipated by the contract...."*

While knowledgeable in the type of construction and contract documents, the DRB members are not qualified to adjudicate issues such as this one that are solely concerned with interpretation of statutory and/or constitutional law.

Special Provisions Section 5-1.12, "Dispute Review Board," subsection "Operation" states, *"The following procedure shall be used for dispute resolution: A. If the contractor objects to any decision, act or order of the engineer, the contractor shall give written notice of potential claim...."*

This dispute did not arise from any decision, act or order of the Engineer.

For all the foregoing reasons, the Department does not believe this dispute is within the type contemplated to be decided by the DRB and requests that the DRB decline to decide the issue. It is the Department's sincere hope that the Contractor will recognize that this dispute is external to the contract, that there is no contractual basis for a claim, and will choose to drop this dispute from further consideration.

DRB Standard for Review of Disputes:

In accordance with the Dispute Review Board Agreement, Section II, "Scope of Work," subsection B, "Procedures," the Dispute Review Board's recommendations *"shall be based on the facts and circumstances involved in the dispute, pertinent contract provisions, applicable laws and regulations."* In some circumstances, the inevitable result of applying the applicable law and contract provisions may seem "unfair" or "unjust." However, parties to a contract are bound by their bargain and even if a result appears "unfair," the DRB's determination must nevertheless be based solely upon these requirements.

CALTRANS' POSITION

In the event that the DRB chooses to decide this dispute, the Department offers the following as its position.

General:

The Contractor's claim is without merit.

The Contractor has not complied with the requirements of Section 9-1.04 of the Standard Specifications. In accordance with the last paragraph of Section 9-1.04, failure to conform to the specified dispute procedures is deemed as the Contractor's waiver of the potential claim and a waiver of the right to a corresponding claim in the administrative claim process and shall operate as a bar to arbitration pursuant to California Public Contract Code.

The Contractor seeks an equitable adjustment in compensation although it does not - and cannot - claim the Department has breached or changed the contract in any way. The Contractor also ignores the fact that a court has already held that the state is not obligated to pay a public works contractor additional monies for increased state sales and use taxes.

The Contractor signed a contract to construct the project and agreed to accept its bid item prices as the full compensation for furnishing all labor, materials, tools, equipment and incidentals necessary to complete the work. In fixed price contracts, the type of contract used here, contract prices do not increase or decrease as the Contractor's costs increase or decrease.

While the contract provides that changes may be made to the work and that compensation may be adjusted accordingly, these provisions apply only where the Department itself has directed a change to the work, i.e. it does not apply to sales tax increases imposed by the Legislature.

In this case, the Department made no changes to the work. The dispute arose from the independent governmental action of the legislature of the State of California, acting in its capacity as a sovereign, i.e. a legislative mandate that was beyond the control of the Department and external to the contract.

The only changes to the work that are compensable under the contract are those made by the Department or the Engineer (See definition of "Work" below and Section 4-1.03 "Changes," of the Standard Specifications). This sales tax increase was not a change to the contract and it did not affect the work as defined by the contract.

Further, the contract allows adjustment in compensation only for certain circumstances: increased or decreased quantities, changes in character of the work, extra work, differing site conditions, and right of way delays. None of these apply in this dispute.

The following additional arguments will show that there is no contractual basis to make payments to the Contractor for the tax increase, nor does the Department have the legal requirement or authority to pay for the tax increase or exempt the Contractor from incurring these costs.

Definitions

"Fixed Price Contracts" (per BusinessDictionary.com):

> *Contract that provides for a price which normally is not subject to any adjustment unless certain provisions (such as contract change, economic pricing, or defective pricing) are included in the agreement. These contracts are negotiated usually where reasonably definite specifications are available, and costs can be estimated with reasonable accuracy. A fixed price contract places minimum administrative burden on the contracting parties, but subjects the contractor to the maximum risk arising from full responsibility for all cost escalations. Also called firm price contract. (emphasis added)*

"Department" – (per Standard Specifications Section 1-1.13):

> *The Department of Transportation of the State of California, as created by law.*

"Engineer" – (per Standard Specifications Section -1.18):

The Chief Engineer, Department of Transportation, acting either directly or through properly authorized agents, the agents acting within the scope of the particular duties delegated to them.

"Work" - (per Standard Specifications Section 1-1.48):

All the work specified, indicated, shown or contemplated in the contract to construct the improvement, including all alterations, amendments or extensions thereto made by contract change order or other written orders of the Engineer.

Events Leading To Enactment of AB 3

On August 6, 2008, Governor Schwarzenegger proposed a temporary 1% increase in the sales tax. (http://articles.latimes.com/2008/aug/05/local/me-budget5). Although this was not included in the budget signed September 23, 2008, the proposal was not abandoned. Approximately six weeks later, on November 6, 2008, Governor Schwarzenegger issued a press release reiterating his intention to seek a 1% increase in the Sales and Use Tax. (See http://gov.ca.gov/index.php?/press-release/10966/). Several months thereafter, on April 1, 2009, Assembly Bill 3 (AB 3), was enacted to temporarily increase the state Sales and Use tax on tangible personal property by 1%.

According to AGC's web site, AGC sought to provide relief for contractors as part of the budget negotiations between the Governor and the Legislative leaders; however their proposed amendments to grant change orders to contractors were not included in the final version of AB 3. (See http://www.agc-ca.org/newslisting.aspx?id=5902)

AGC, along with a consortium of contractor organizations then proposed legislation to exempt public works/fixed price contracts from the tax increase, (See Exhibit C-2, AB 1523), the bill failed and AB 3 has no such exemption.[1] The Legislature's refusal to exempt fixed priced contracts from the sales tax increase in AB 3, and their refusal to allow for change orders for refunds of the increase, reflects the legislature's intent that the consumers of tangible personal property pay the increased tax.

By virtue of the fact that the consortium of contractor organizations found it necessary to propose legislation to exempt public works/fixed price contracts from the tax increase, it is evident that the construction industry recognizes that there are no contractual or legal requirements obligating the Department to make any adjustments for this tax increase.

Applicable Law

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[1] On February 27, 2009, AB 1523 was introduced in the Legislature. Recognizing that there was no exemption in AB 3 for fixed price type contracts, the Construction Industry via letter dated March 19, 2009 co-sponsored Assembly Bill 1523 (AB 1523) (Calderon) which relieves parties who entered into a fixed price contract before enactment of the 1 percent increase from paying the increased tax (See Exhibit C-4). This bill is currently in Appropriations held in suspense and, according to the bill's sponsor, it is not expected to pass.

The Department does not have the legal authority - and is not required to - reimburse the contractor for the increased costs to the contract resulting from the sales tax increase. Existing case law directly holds that public entities who are parties to fixed price, public works contracts are not obligated to pay a contractor additional compensation to cover increased sales taxes. (See Exhibit C-6, *Western Contracting Corporation v. State Board of Equalization* (1974) 39 Cal.App.3d 341.)

In *Western Contracting,* the California Department of Water Resources ("DWR") awarded a fixed-price public works contract to Western Contracting ("Western") for construction of the Castaic dam. After award, the Legislature enacted a 1% increase in the Sales and Use tax resulting in additional costs to Western. Western filed suit against DWR arguing (1) that all of its increased costs were included within an exemption to the new tax increase; (2) that if the exemption did not apply, then Western was entitled to additional compensation and (3) if the exemption did not apply and it was not entitled to additional compensation, then the increase in sales tax was an unconstitutional impairment of its contract. The court held that the exemption did not apply, that Western **was not entitled to any additional compensation due to the sales tax increase and that there was no impairment of the contract.**

The court noted that the State, in increasing the sales tax, was acting in its capacity as a sovereign. The court also noted that the contract included a provision stating that "the contract price shall include full compensation for all taxes which the Contractor is required to pay." This contract includes the same language. See Standard Specification Section 7-1.03, "Payment of Taxes." Likewise, the court in *Western Contracting* noted that the "Changes" clause clearly contemplated additional payment only for changes to the scope of work. Again, the "Changes" clause in this contract includes the same concept. See Standard Specification Section 4-1.03, "Changes."

The ruling from *Western* stated:

> Where contract with Department of Water Resources to build dam provided that the contract price included full compensation for all taxes which the contractor is required to pay, whether imposed by federal, state or local government, contract further provided that the contract price of the work would include full compensation for all costs incurred and the provisions of the contract relating to "changes in the contract" pertained only to those which affected the amount or quality of the work, contractor was not entitled to additional compensation on account of increased tax burden which resulted from increase in state sales and use taxes. (emphasis added)

The *Western* court found support of its decision in many prior rulings including at least one from the United States Supreme Court, El Paso v. Simmons (1965) 379 U.S. 497 and a federal court ruling, John McShain, Inc. v. District of Columbia, 92 U.S.App.D.C. 358,205 F.2d 882 which stated:

> The imposition of a new tax, or an increase in the rate of an old one, is one of the usual hazards of business enterprise: seldom, if ever, does such an event impair the obligation of a pre-existing contract.

Hence, courts have already determined that a department of the state who is a party to a fixed-price, public works contract has no obligation to compensate a contractor for increased costs resulting from an increase to the sales and use tax and the contractor's incurring an increase in an existing tax rate is one of the usual hazards of business enterprise.

Further, the California Constitution denies the Department the authority to pay for the increased costs resulting from an increase in the sales and use tax. The California Constitution – Article 4, Section 17, states:

> *The legislature has no power to grant, or to authorize a city, county, or other public body to grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part...*

This part of the section means that the legislature cannot shift their constitutional authority to the Department to provide extra compensation to the Contractor at will once it has entered into a contract, i.e. fixed price contract. This is likely one of the reasons why the legislature decided not to include AGC's proposed amendment to AB3 that would grant change orders to contractors for this sales tax increase.

Adjustments in compensation are only allowed when the contract provisions specifically provide for those adjustments. The asphalt price index adjustment is an example of one such provision. Since no provisions exist in this contract to exempt the Contractor from sales tax increases or for reimbursement of these increases, an adjustment in compensation for such costs cannot be provided.

The second part to Article 4, Section 17, states that the legislature has no power to:

> *... authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law.*

That is, since the legislature cannot shift their constitutional authority to the Department to provide additional compensation under these circumstances, if the Department were to execute a contract change order to compensate the Contractor for this potential claim (as the Contractor is requesting), it would constitute an agreement made without authority of the law.

In order for the Department to make payment due to a change in the law, either an adjudicating court of law would have to require it, or the California legislature would have to authorize the Department to do so. As explained above, a court of law has already considered this issue and found in favor of a Department of the State of California under nearly identical circumstances and contractual provisions. And as the California Constitution states, the legislature has no power to authorize the Department to make extra compensation or allowance to the contractor after a contract has been entered into and further the Department cannot write a contract change order to pay for a claim on this issue as it would constitute an agreement made without authority of the law.

Contractual and Legal Requirements:

This sales tax increase is no different than any other change in the Contractor's costs that the contractor may incur, e.g. increases or decreases in gasoline taxes or vehicle licensing

fees, etc. This is a fixed price contract which, by definition, requires that the contract bid item prices do not change - even if the contractor's costs change.

The fact is, in determining responsibility for payment for this sales tax increase, it is important to identify who initiated it. The Contractor makes the statement that "Increased sales and use tax costs as directed by the State constitute a change in the contract provisions; therefore the State should compensate the contractor for changes in tax rates." This statement is incorrect. The contract and the law specifically contemplate that changes in the law are not changes in the contract. Section 4-1.03, "Changes," of the Standard Specifications states:

> *The Department reserves the right to make such alterations, deviations, additions to or deletions from the plans and specifications, including the right to increase or decrease the quantity of any item or portion of the work or to delete any item or portion of the work, as may be deemed by the Engineer to be necessary or advisable and to require such extra work as may be determined by the Engineer to be required for the proper completion or construction of the whole work contemplated.* (emphasis added)

Pursuant to this provision, only the Department or the Engineer has authority to order a change in this contract. The Legislature of the State of California is not a party to this contract. The legislature is a separate sovereign entity of the State of California, as created by the California Constitution.

Further, this claim is not predicated on any change made to the plans or specifications. If the Department had made a change to the plans or specifications, there would be no dispute.

This change falls under a legal doctrine called the Sovereign Acts Doctrine. Under the law, the State is always authorized to act as a sovereign who can enact laws for the public benefit (e.g. tax increases). At the same time, the State may be a party to a contract. Where the state, in its role as sovereign, enacts laws which may affect contracts to which it is a party, existing law specifies that the State is to be treated as if it were a private party. In other words, where a private party would not be liable for increased costs due to changes in law, the State is likewise not to be held liable.

In this case, the Contractor could not argue that a private party could be held liable for increased costs resulting from an increase in state sales tax. The law requires that when the State is a party to a contract, it is to be treated exactly the same as any private party would be treated. Since no private party would be held liable, the Department cannot be liable either.

The issuance of this sales tax increase is a sovereign act for the public good. So long as the sovereign act is public and general, it cannot be construed as to alter or obstruct a particular contract. Likewise, if a change in any other law or regulation had been in the Contractor's favor, Caltrans would not be able to reap a benefit.

Standard Specifications Section 7-1.01, "Laws to be Observed," states:

> *The Contractor shall keep fully informed of all existing and future State and Federal laws and county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work, or the materials used in the*

work, or which in any way affect the conduct of the work, and of all orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. The Contractor shall at all times observe and comply with, and shall cause all the Contractor's agents and employees to observe and comply with all existing and future laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work; and shall protect and indemnify the State of California, and all officers and employees thereof connected with the work, including by not limited to the Director and the Engineer, against any claim or liability arising from or based on the violation of any law, ordinance, regulation, order or decree, whether by the Contractor or the Contractor's employees. If any discrepancy or inconsistency is discovered in the plans, drawings, specifications or contract for the work in relation to any law, ordinance, regulation, order or decree, the Contractor shall forthwith report same to the Engineer in writing.

This section requires the Contractor to keep informed of current and future laws, comply with the law that exists on the day that it performs the work on the project, and indemnify the Department if it fails to do so.

Often it is argued that Section 7-1.01 is silent with regard to payment for complying with the law. This is definitely not the case here. By paying the contract item prices, the Department has fulfilled its contractual payment obligation with regard to this dispute. Payment for complying with the increase in sales tax is included in the contract bid items as per Section 7-1.03, "Payment of Taxes," and Section 9-1.02, "Scope of Payment."

Standard Specifications Section 7-1.03 states:

The contract price paid for the work shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by Federal, State or local government, including, without being limited to Federal excise tax. No tax exemption certificate nor any document designed to exempt the Contractor from payment of any tax will be furnished to the Contractor by the Department, as to any tax on labor, services, materials, transportation or any other items furnished pursuant to the contract." (emphasis added)

This section informs the Contractor that it will not be compensated above the contract prices for the payment of all the taxes it is required to pay (whether or not they change), and further specifically precludes the Department from furnishing any document, e.g. contract change order, which would exempt the Contractor from paying any part of this tax.

Standard Specifications Section 9-1.02 states:

The Contractor shall accept the compensation provided in the contract as full payment for furnishing all labor, materials, tools, equipment, and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contract; also for loss or damage arising from the nature of the work, or from the action of the elements, or from any unforeseen difficulties which may be encountered during the prosecution of the work until the acceptance by the Director and for all risks of every description connected with the

prosecution of the work, also for all expenses incurred in consequence of the suspension or discontinuance of the work as provided in the contract; and for completing the work according to the plans and specifications" (emphasis added).

The Contractor states, "Although Section 7-1.03, "Payment of Taxes," states that full compensation to the contractor for all taxes is included in the contract prices, it does not mean that the contractor necessarily bears the risk of paying for the cost of compliance. Additionally, Section 9-1.02 requires the contractor to only assume the risk of unforeseen difficulties in the work 'contemplated and embraced' by the contract...The 1% increase in the use and sales tax was not 'contemplated or embraced under the contract' and constitute a changed condition of work."

As stated previously, in determining responsibility for payment for this sales tax increase, it is important to identify who initiated the change. The Contractor's assertion that the change in sales tax was not contemplated or embraced under the contract fails to recognize the Sovereigns Act Doctrine which allows the legislature to make such changes without changing the obligations of the contract. Therefore, whether or not the sales tax increase was contemplated or embraced at bid time does not obligate the Department to compensate the Contractor for this claim since it was the legislature who made the change.

There was no change in the "work" contemplated, embraced and defined by the contract, i.e. a legislative increase in sales tax does not change the work required to fulfill the obligations of the contract as anticipated by the plans and specifications. Again, this change was initiated from outside the contract.

With regard to risk, Standard Specifications Section 9-1.02, "Scope of Payment," includes verbiage regarding the Contractor's acceptance of the contract prices as full payment for "all risks of every description connected with prosecution of the work." While the contract alleviates the Contractor from some risks, e.g. differing site conditions, right of way delays, fluctuations in oil price index, etc., it does not take all of the risk out of the contract. The fact is, nothing in Section 9-1.02 or any where else in the contract exempts the Contractor from the risk of changes in the State's sales tax laws.

An increase in sales tax falls within the "all risks of every description" language of Section 9-1.02. This is in fact consistent with the case law cited earlier, John McShain, Inc. v. District of Columbia, which stated, "The imposition of a new tax, or an increase in the rate of an old one, is one of the usual hazards of business enterprise."

Thus, the contract expressly and unambiguously assigns the risk of incurring such tax increases to the Contractor. This is true for all fixed price type projects which subject the Contractor to the maximum risk arising from full responsibility for all cost escalations.

Finally, because the contract terms are agreed to by both parties by virtue of their entering into this fixed-price contract, there can be no assertion that the Department is unilaterally increasing the risk of the Contractor.

Wage Order 16

Adopted in January 2001, Wage Order 16 was a mandate from the Industrial Welfare Commission that required Contractors to provide their employees a 10-minute rest period for every four hours worked. Some in the industry have attempted to equate the Wage

Order 16 dispute with the dispute in question here since they both were statewide issues that arose because of change in the state law. The two disputes, however, are not equivalent.

Contractors argued that Wage Order 16 (WO 16) had a material effect on the production and progress of work on many of the ongoing contracts. Typical arguments used to support the Contractors' positions with regard to the impacts of WO16 stated that WO16 materially altered work rules by requiring Contractors to stop production, secure their work site, allow time for workers to move to a safe location designated for the breaks, remobilize workers, and then recommence work. The Contractors contended that this consequently impacted the manner in which they accomplished their work, delayed work, slowed production, and created extra work thereby increasing the time and cost of the project.

In this case, a sales tax increase neither affects the work, nor the manner in which the work is performed. It also does not create any extra work, affect production, nor delay completion of the contracted work.

In the WO16 dispute, the Contractor stated that the work associated with compliance with the new law was not contemplated or embraced at bid time and many Contractors attempt to make the same argument with regard to the dispute in question here. The sales tax issue, however, ***is*** specifically contemplated and embraced by Standard Specifications Section 7-1.03, "Payment of Taxes". Not only does Section 7-1.03 provide that payment of all the taxes the contractor is required to pay is included in the fixed contract item prices paid by the Department, it specifically precludes the Department from furnishing the Contractor any document, e.g. change order, designed to exempt the contractor from payment of any tax on materials. Also contemplated and embraced by the contract is the definition of the word "work" which provides only for changes/orders of the Engineer – not those made by entities outside the contract.

It should also be pointed out that not all of the claims regarding WO 16 have been resolved. Of those that were resolved, typically, they were part of confidential negotiated global settlements that may have included several claims. The Department has not specifically assigned any merit to claims regarding WO 16.

Please see Appendix C-10 for a detailed response to the argument that the dispute in question here is equivalent to the WO 16 dispute.

We urge the DRB to evaluate the Department's position regarding this dispute on its own merits based on the information provided in this position paper including the case law, the California Constitution, and the applicable parts of the contract.

SUMMARY

The Contractor's claim has no merit based on the following:

- The dispute arose from events outside the Contract.
- The Department has not breached or changed the contract.
- A change in the law which occurred for the general public good does not constitute a change in the contract.

- Only the Department itself can make a change to the contract. If the Department had ordered a change to the contract, there would be no dispute.
- The contract definition of "Work" per Standard Specifications Section 1-1.48 includes only "alterations, amendments or extensions thereto made by contract change order or other written orders of the Engineer."
- This increase in sales tax does not affect the work, nor does it add any work, nor does it affect the means and methods used to accomplish the work as defined by the contract.
- California case law supports the State's position.
- The California Constitution does not allow the legislature to shift their authority to the Department to pay for increased costs to a contractor after a contract has been entered into, and specifically provides that executing a change order to compensate the Contractor for this claim would constitute an agreement made without authority of the law.
- Standard Specifications Section 7-1.01, "Laws to be Observed," requires the Contractor to keep fully informed of, observe, and comply with the law and requires the Contractor to protect and indemnify the State against any claim or liability arising from the violation of any law.
- Per Standard Specifications Section 7-1.03, "Payment of Taxes," the contract prices paid for the work includes full compensation for all taxes which the Contractor is required to pay and specifically precludes the Department from issuing any document that would exempt the Contractor from paying any taxes.
- Per Standard Specifications Section 9-1.02, "Scope of Payment," the Contractor will accept the compensation provided in the contract as full payment for completing the work and for all risks of every description connected with the prosecution of the work.
- Change in current laws, including temporary tax increases, are risks that a contractor incurs by virtue of bidding on fixed price contracts. Compensation for all risks of every description connected with the prosecution of the work is included in the various bid item prices.
- The Construction Industry organizations recognize that the Department is not obligated to make payment for the tax increase as evidenced by their co-sponsoring of legislation, i.e. AB 1523, to try to get an exemption.

Caltrans has neither the legal authority nor the liability to compensate the contractor for any costs incurred by the contractors as a result of their compliance with this law and is, in fact, precluded from doing so by the law and the contract.

The DRB is asked to determine that no additional compensation is due for NOPC 10, based on the reasons set forth above.

APPENDIX A

Applicable Specifications and Contract Documents

4-1.03 CHANGES

. The Department reserves the right to make such alterations, deviations, additions to or deletions from the plans and specifications, including the right to increase or decrease the quantity of any item or portion of the work or to delete any item or portion of the work, as may be deemed by the Engineer to be necessary or advisable and to require such extra work as may be determined by the Engineer to be required for the proper completion or construction of the whole work contemplated.

. Those changes will be set forth in a contract change order which will specify, in addition to the work to be done in connection with the change made, adjustment of contract time, if any, and the basis of compensation for that work. A contract change order will not become effective until approved by the Engineer.

. Upon receipt of an approved contract change order, the Contractor shall proceed with the ordered work. If ordered in writing by the Engineer, the Contractor shall proceed with the work so ordered prior to actual receipt of an approved contract change order therefor. In those cases, the Engineer will, as soon as practicable, issue an approved contract change order for the ordered work and the provisions in Section 4-1.03A, "Procedure and Protest," shall be fully applicable to the subsequently issued contract change order.

. When the compensation for an item of work is subject to adjustment under the provisions of this Section 4-1.03, the Contractor shall, upon request, furnish the Engineer with adequate detailed cost data for that item of work. If the Contractor requests an adjustment in compensation for an item of work as provided in Sections 4-1.03B(1) or 4-1.03B(2), the cost data shall be submitted with the request.

4-1.03A Procedure and Protest

. A contract change order approved by the Engineer may be issued to the Contractor at any time. Should the Contractor disagree with any terms or conditions set forth in an approved contract change order not executed by the Contractor, the Contractor shall submit a written protest to the Engineer within 15 days after the receipt of the approved contract change order. The protest shall state the points of disagreement, and, if possible, the contract specification references, quantities and costs involved. If a written protest is not submitted, payment will be made as set forth in the approved contract change order, and that payment shall constitute full compensation for all work included therein or required thereby. Unprotested approved contract change orders will be considered as executed contract change orders as that term is used in Sections 4-1.03B to 4-1.03D, inclusive.

. Where the protest concerning an approved contract change order relates to compensation, the compensation payable for all work specified or required by that contract change order to which the protest relates will be determined as provided in Sections 4-1.03B to 4-1.03D, inclusive. The Contractor shall keep full and complete records of the cost of that work and shall permit the Engineer to have access thereto as may be necessary to assist in the determination of the compensation payable for that work.

. Where the protest concerning an approved contract change order relates to the adjustment of contract time for the completion of the work, the time to be allowed therefor will be determined as provided in Section 8-1.07, "Liquidated Damages."

. Proposed contract change orders may be presented to the Contractor for consideration prior to approval by the Engineer. If the Contractor signifies acceptance of the terms and conditions of the proposed contract change order by executing the document and if the change order is approved by the Engineer and issued to the Contractor, payment in accordance with the

provisions as to compensation therein set forth shall constitute full compensation for all work included therein or required thereby. A contract change order executed by the Contractor and approved by the Engineer is an executed contract change order as that term is used in Sections 4-1.03B to 4-1.03D, inclusive. An approved contract change order shall supersede a proposed, but unapproved, contract change order covering the same work.

. The Engineer may provide for an adjustment of compensation as to a contract item of work included in a contract change order determined as provided in Sections 4-1.03B to 4-1.03D, inclusive, if that item of work is eligible for an adjustment of compensation thereunder.

4-1.03B Increased or Decreased Quantities

. Increases or decreases in the quantity of a contract item of work will be determined by comparing the total pay quantity of that item of work with the Engineer's Estimate therefor.

. If the total pay quantity of any item of work required under the contract varies from the Engineer's Estimate therefor by 25 percent or less, payment will be made for the quantity of work of the item performed at the contract unit price therefor, unless eligible for adjustment pursuant to Section 4-1.03C, "Changes in Character of Work."

. If the total pay quantity of any item of work required under the contract varies from the Engineer's Estimate therefor by more than 25 percent, in the absence of an executed contract change order specifying the compensation to be paid, the compensation payable to the Contractor will be determined in accordance with Sections 4-1.03B(1), 4-1.03B(2), or 4-1.03B(3), as the case may be.

4-1.03B(1) Increases of More Than 25 Percent

. Should the total pay quantity of any item of work required under the contract exceed the Engineer's Estimate therefor by more than 25 percent, the work in excess of 125 percent of the estimate and not covered by an executed contract change order specifying the compensation to be paid therefor will be paid for by adjusting the contract unit price, as hereinafter provided, or at the option of the Engineer, payment for the work involved in the excess will be made on the basis of force account as provided in Section 9-1.03.

. The adjustment of the contract unit price will be the difference between the contract unit price and the actual unit cost, which will be determined as hereinafter provided, of the total pay quantity of the item. If the costs applicable to the item of work include fixed costs, the fixed costs will be deemed to have been recovered by the Contractor by the payments made for 125 percent of the Engineer's Estimate of the quantity for the item, and in computing the actual unit cost, the fixed costs will be excluded. Subject to the above provisions, the actual unit cost will be determined by the Engineer in the same manner as if the work were to be paid for on a force account basis as provided in Section 9-1.03; or the adjustment will be as agreed to by the Contractor and the Engineer.

. When the compensation payable for the number of units of an item of work performed in excess of 125 percent of the Engineer's Estimate is less than $5000 at the applicable contract unit price, the Engineer reserves the right to make no adjustment in the contract unit price if the Engineer so elects, except that an adjustment will be made if requested in writing by the Contractor.

4-1.03B(2) Decreases of More Than 25 Percent

. Should the total pay quantity of any item of work required under the contract be less than 75 percent of the Engineer's Estimate therefor, an adjustment in compensation pursuant to this Section will not be made unless the Contractor so requests in writing. If the Contractor so

requests, the quantity of the item performed, unless covered by an executed contract change order specifying the compensation payable therefor, will be paid for by adjusting the contract unit price as hereinafter provided, or at the option of the Engineer, payment for the quantity of the work of the item performed will be made on the basis of force account as provided in Section 9-1.03, provided however, that in no case shall the payment for that work be less than that which would be made at the contract unit price.

. The adjustment of the contract unit price will be the difference between the contract unit price and the actual unit cost, which will be determined as hereinafter provided, of the total pay quantity of the item, including fixed costs. The actual unit cost will be determined by the Engineer in the same manner as if the work were to be paid for on a force account basis as provided in Section 9-1.03; or the adjustment will be as agreed to by the Contractor and the Engineer.

. The payment for the total pay quantity of the item of work will in no case exceed the payment which would be made for the performance of 75 percent of the Engineer's Estimate of the quantity for the item at the original contract unit price.

4-1.03B(3) Eliminated Items

. Should any contract item of the work be eliminated in its entirety, in the absence of an executed contract change order covering the elimination, payment will be made to the Contractor for actual costs incurred in connection with the eliminated contract item if incurred prior to the date of notification in writing by the Engineer of the elimination.

. If acceptable material is ordered by the Contractor for the eliminated item prior to the date of notification of the elimination by the Engineer, and if orders for that material cannot be canceled, the material will be paid for at the actual cost to the Contractor. In this case, the material paid for shall become the property of the State, and the actual cost of any further handling will be paid for. If the material is returnable to the vendor and if the Engineer so directs, the material shall be returned and the Contractor will be paid for the actual cost of charges made by the vendor for returning the material. The actual cost of handling returned material will be paid for.

. The actual costs or charges to be paid by the Department to the Contractor as provided in this Section 4-1.03B(3) will be computed in the same manner as if the work were to be paid for on a force account basis as provided in Section 9-1.03.

4-1.03C Changes in Character of Work

. If an ordered change in the plans or specifications materially changes the character of the work of a contract item from that on which the Contractor based the bid price, and if the change increases or decreases the actual unit cost of the changed item as compared to the actual or estimated actual unit cost of performing the work of that item in accordance with the plans and specifications originally applicable thereto, in the absence of an executed contract change order specifying the compensation payable, an adjustment in compensation therefor will be made in accordance with the following.

. The basis of the adjustment in compensation will be the difference between the actual unit cost to perform the work of that item or portion thereof involved in the change as originally planned and the actual unit cost of performing the work of the item or portion thereof involved in the change, as changed. Actual unit costs will be determined by the Engineer in the same manner as if the work were to be paid for on a force account basis as provided in Section 9-1.03; or the adjustment will be as agreed to by the Contractor and the Engineer. The adjustment will apply only to the portion of the work of the item actually changed in character. At the option of

the Engineer, the work of the item or portion of item which is changed in character will be paid for by force account as provided in Section 9-1.03.

. If the compensation for an item of work is adjusted under this Section 4-1.03C, the costs recognized in determining that adjustment shall be excluded from consideration in making an adjustment for that item of work under the provisions in Section 4-1.03B, "Increased or Decreased Quantities."

. Failure of the Engineer to recognize a change in character of the work at the time the approved contract change order is issued shall in nowise be construed as relieving the Contractor of the duty and responsibility of filing a written protest within the 15 day limit as provided in Section 4-1.03A, "Procedure and Protest."

4-1.03D Extra Work

. New and unforeseen work will be classed as extra work when determined by the Engineer that the work is not covered by any of the various items for which there is a bid price or by combinations of those items. In the event portions of this work are determined by the Engineer to be covered by some of the various items for which there is a bid price or combinations of those items, the remaining portion of the work will be classed as extra work. Extra work also includes work specifically designated as extra work in the plans or specifications.

. The Contractor shall do the extra work and furnish labor, material and equipment therefor upon receipt of an approved contract change order or other written order of the Engineer, and in the absence of an approved contract change order or other written order of the Engineer the Contractor shall not be entitled to payment for the extra work.

. Payment for extra work required to be performed pursuant to the provisions in this Section 4-1.03D, in the absence of an executed contract change order, will be made by force account as provided in Section 9-1.03; or as agreed to by the Contractor and the Engineer.

9-1.04 NOTICE OF POTENTIAL CLAIM

. The Contractor shall not be entitled to the payment of any additional compensation for any act, or failure to act, by the Engineer, including failure or refusal to issue a change order, or for the happening of any event, thing, occurrence or other cause, unless the Contractor shall have given the Engineer due written notice of potential claim as hereinafter specified. Compliance with this Section 9-1.04 shall not be a prerequisite as to matters within the scope of the protest provisions in Section 4-1.03, "Changes," or Section 8-1.06, "Time of Completion," or the notice provisions in Section 5-1.116, "Differing Site Conditions," or Section 8-1.07, "Liquidated Damages," or Section 8-1.10, "Utility and Non-Highway Facilities," nor to any claim which is based on differences in measurements or errors of computation as to contract quantities.

. The written notice of potential claim shall be submitted to the Engineer prior to the time that the Contractor performs the work giving rise to the potential claim for additional compensation, if based on an act or failure to act by the Engineer, or in all other cases within 15 days after the happening of the event, thing, occurrence or other cause, giving rise to the potential claim.

. The written notice of potential claim shall be submitted on Form CEM-6201 furnished by the Department and shall be certified with reference to the California False Claims Act, Government Code Sections 12650 - 12655. The notice shall set forth the reasons for which the Contractor believes additional compensation will or may be due and the nature of the costs involved. Unless the amount of the potential claim has been stated in the written notice, the Contractor shall, within 15 days of submitting the notice, furnish an estimate of the cost of the affected work and impacts, if any, on project completion. The estimate of costs may be changed or updated by the Contractor when conditions have changed. When the affected work is completed, the Contractor shall submit substantiation of the Contractor's actual costs. Failure to do so shall be sufficient cause for denial of any claim subsequently filed on the basis of the notice of potential claim.

. It is the intention of this Section 9-1.04 that differences between the parties arising under and by virtue of the contract be brought to the attention of the Engineer at the earliest possible time in order that the matters may be settled, if possible, or other appropriate action promptly taken. The Contractor hereby agrees that the Contractor shall have no right to additional compensation for any claim that may be based on any act, failure to act, event, thing or occurrence for which no written notice of potential claim as herein required was filed.

. Should the Contractor, in connection with or subsequent to the assertion of a potential claim, request inspection and copying of documents or records in the possession of the Department that pertain to the potential claim, the Contractor's records of the project, as deemed by the Department to be pertinent to the potential claim, shall be made available to the Department for inspection and copying.

7-1.01 LAWS TO BE OBSERVED

The Contractor shall keep fully informed of all existing and future State and Federal laws and county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work, or the materials used in the work, or which in any way affect the conduct of the work, and of all orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. The Contractor shall at all times observe and comply with, and shall cause all the Contractor's agents and employees to observe and comply with all existing and future laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work; and shall protect and indemnify the State of California, and all officers and employees thereof connected with the work, including but not limited to the Director and the Engineer, against any claim or liability arising from or based on the violation of any law, ordinance, regulation, order or decree, whether by the Contractor or the Contractor's employees. If any discrepancy or inconsistency is discovered in the plans, drawings, specifications or contract for the work in relation to any law, ordinance, regulation, order or decree, the Contractor shall forthwith report the same to the Engineer in writing.

7-1.01A Labor Code Requirements

Attention is directed to the following requirements of the Labor Code:

7-1.01A(1) Hours of Labor

Eight hours labor constitutes a legal day's work. The Contractor or any subcontractor under the Contractor shall forfeit, as a penalty to the State of California, $25 for each worker employed in the execution of the contract by the respective Contractor or subcontractor for each calendar day during which that worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the requirements of the Labor Code, and in particular, Section 1810 to Section 1815, thereof, inclusive, except that work performed by employees of Contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon compensation for all hours worked in excess of 8 hours per day at not less than one and one-half times the basic rate of pay, as provided in Section 1815 thereof.

7-1.01A(2) Prevailing Wage

The Contractor and any subcontractor under the Contractor shall comply with Labor Code Sections 1774 and 1775. Pursuant to Section 1775, the Contractor and any subcontractor under the Contractor shall forfeit to the State or political subdivision on whose behalf the contract is made or awarded a penalty of not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of Industrial Relations for the work or craft in which the worker is employed for any public work done under the contract by the Contractor or by any subcontractor under the Contractor in violation of the requirements of the Labor Code and in particular, Labor Code Sections 1770 to 1780, inclusive. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the Contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the Contractor or subcontractor in meeting their respective prevailing wage obligations, or the willful failure by the Contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the Contractor or subcontractor had knowledge of the obligations under the Labor Code. In addition to the penalty and pursuant to Labor Code Section 1775, the difference

between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the Contractor or subcontractor. If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for the penalties described above unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

1. The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the requirements in Sections 1771, 1775, 1776, 1777.5, 1813 and 1815 of the Labor Code.
2. The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
3. Upon becoming aware of the subcontractor's failure to pay the specified prevailing rate of wages to the subcontractor's workers, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
4. Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to the subcontractor's employees on the public works project and any amounts due pursuant to Section 1813 of the Labor Code.

. Pursuant to Section 1775 of the Labor Code, the Division of Labor Standards Enforcement shall notify the Contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the Department did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The Contractor shall pay any money retained from and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the Contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the Contractor shall pay all moneys retained from the subcontractor to the Department. These moneys shall be retained by the Department pending the final decision of an enforcement action.

. Pursuant to the requirements in Section 1773 of the Labor Code, the Department has obtained the general prevailing rate of wages (which rate includes employer payments for health and welfare, pension, vacation, travel time and subsistence pay as provided for in Section 1773.8 of the Labor Code, apprenticeship or other training programs authorized by Section 3093 of the Labor Code, and similar purposes) applicable to the work to be done, for straight time, overtime,

Saturday, Sunday and holiday work. The holiday wage rate listed shall be applicable to all holidays recognized in the collective bargaining agreement of the particular craft, classification or type of workmen concerned.

. The general prevailing wage rates and any applicable changes to these wage rates are available at the Labor Compliance Office at the offices of the District Director of Transportation for the district in which the work is situated. General prevailing wage rates are also available from the California Department of Industrial Relations' Internet Web Site at: http://www.dir.ca.gov.

. The wage rates determined by the Director of Industrial Relations for the project refer to expiration dates. Prevailing wage determinations with a single asterisk after the expiration date are in effect on the date of advertisement for bids and are good for the life of the contract. Prevailing wage determinations with double asterisks after the expiration date indicate that the wage rate to be paid for work performed after this date has been determined. If work is to extend past this date, the new rate shall be paid and incorporated in the contract. The Contractor shall contact the Department of Industrial Relations as indicated in the wage rate determinations to obtain predetermined wage changes.

. Pursuant to Section 1773.2 of the Labor Code, general prevailing wage rates shall be posted by the Contractor at a prominent place at the site of the work.

. Changes in general prevailing wage determinations which conform to Labor Code Section 1773.6 and Title 8 California Code of Regulations Section 16204 shall apply to the project when issued by the Director of Industrial Relations at least 10 days prior to the date of the Notice to Contractors for the project.

. The State will not recognize any claim for additional compensation because of the payment by the Contractor of any wage rate in excess of the prevailing wage rate set forth in the contract. The possibility of wage increases is one of the elements to be considered by the Contractor in determining the bid, and will not under any circumstances be considered as the basis of a claim against the State on the contract.

7-1.01A(2)(a) Travel and Subsistence Payments

. Attention is directed to the requirements in Section 1773.8 of the Labor Code. The Contractor shall make travel and subsistence payments to each workman, needed to execute the work, in conformance with the requirements in Labor Code Section 1773.8.

7-1.01A(3) Payroll Records

. Attention is directed to the requirements in Labor Code Section 1776, a portion of which is quoted below. Regulations implementing Labor Code Section 1776 are located in Sections 16016 through 16019 and Sections 16207.10 through 16207.19 of Title 8, California Code of Regulations.

"(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

"(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.
(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.
(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

"(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

"(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

"(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated.

"(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

"(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement,

these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section."

. The penalties specified in subdivision (g) of Labor Code Section 1776 for noncompliance with the requirements in Section 1776 may be deducted from any moneys due or which may become due to the Contractor.

. A copy of all payrolls shall be submitted weekly to the Engineer. Payrolls shall contain the full name, address and social security number of each employee, the employee's correct classification, rate of pay, daily and weekly number of hours worked, itemized deductions made and actual wages paid. They shall also indicate apprentices and ratio of apprentices to journeymen. The employee's address and social security number need only appear on the first payroll on which that name appears. The payroll shall be accompanied by a "Statement of Compliance" signed by the employer or the employer's agent indicating that the payrolls are correct and complete and that the wage rates contained therein are not less than those required by the contract. The "Statement of Compliance" shall be on forms furnished by the Department or on any form with identical wording. The Contractor shall be responsible for the submission of copies of payrolls of all subcontractors.

. If by the 15th of the month, the Contractor has not submitted satisfactory payrolls for all work performed during the monthly period ending on or before the 1st of that month, the Department will retain an amount equal to 10 percent of the estimated value of the work performed (exclusive of Mobilization) during the month from the next monthly estimate, except that this retention shall not exceed $10 000 nor be less than $1000. Retentions for failure to submit satisfactory payrolls shall be additional to all other retentions provided for in the contract. The retention for failure to submit payrolls for any monthly period will be released for payment on the monthly estimate for partial payments next following the date that all the satisfactory payrolls for which the retention was made are submitted.

. The Contractor and each subcontractor shall preserve their payroll records for a period of 3 years from the date of completion of the contract.

7-1.01A(4) Labor Nondiscrimination

. Attention is directed to Section 1735 of the Labor Code, which reads as follows:

"No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter."

. Attention is directed to the following "Nondiscrimination Clause" that is required by Chapter 5 of Division 4 of Title 2, California Code of Regulations.

NONDISCRIMINATION CLAUSE

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex. Contractors and subcontractors shall ensure that the

evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, Section 12990 et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990, set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

2. This Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

STANDARD CALIFORNIA NONDISCRIMINATION CONSTRUCTION CONTRACT SPECIFICATIONS (GOV. CODE, SECTION 12990).

These specifications are applicable to all state contractors and subcontractors having a construction contract or subcontract of $5,000, or more.

1. As used in the specifications:

   a. "Administrator" means Administrator, Office of Compliance Programs, California Department of Fair Employment and Housing, or any person to whom the Administrator delegates authority;
   b. "Minority" includes:

      (i) Black (all persons having primary origins in any of the black racial groups of Africa, but not of Hispanic origin);
      (ii) Hispanic (all persons of primary culture or origin in Mexico, Puerto Rico, Cuba, Central or South America or other Spanish derived culture or origin regardless of race);
      (iii) Asian / Pacific Islander (all persons having primary origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); and
      (iv) American Indian / Alaskan Native (all persons having primary origins in any of the original peoples of North America and who maintain culture identification through tribal affiliation or community recognition).

2. Whenever the contractor or any subcontractor subcontracts a portion of the work, it shall physically include in each subcontract of $5,000 or more the nondiscrimination clause in this contract directly or through incorporation by reference. Any subcontract for work involving a construction trade shall also include the Standard California Construction Contract Specifications, either directly or through incorporation by reference.
3. The contractor shall implement the specific nondiscrimination standards provided in paragraph 6(a) through (e) of these specifications.
4. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer either minorities

or women shall excuse the contractor's obligations under these specifications, Government Code, Section 12990, or the regulations promulgated pursuant thereto.

5. In order for the nonworking training hours of apprentices and trainees to be counted, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor or the California Department of Industrial Relations.
6. The contractor shall take specific actions to implement its nondiscrimination program. The evaluation of the contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The contractor must be able to demonstrate fully its efforts under Steps a. through e. below:

    a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and at all facilities at which the contractor's employees are assigned to work. The contractor, where possible, will assign two or more women to each construction project. The contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the contractor's obligations to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
    b. Provide written notification within seven days to the director of DFEH when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.
    c. Disseminate the Contractor's equal employment opportunity policy by providing notice of the policy to unions and training, recruitment and outreach programs and requesting their cooperation in assisting the Contractor to meet its obligations; and by posting the company policy on bulletin boards accessible to all employees at each location where construction work is performed.
    d. Ensure all personnel making management and employment decisions regarding hiring, assignment, layoff, termination, conditions of work, training, rates of pay or other employment decisions, including all supervisory personnel, superintendents, general foremen, on-site foremen, etc., are aware of the Contractor's equal employment opportunity policy and obligations, and discharge their responsibilities accordingly.
    e. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the equal employment opportunity policy and the Contractor's obligations under these specifications are being carried out.

7. Contractors are encouraged to participate in voluntary associations which assist in fulfilling their equal employment opportunity obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or

more of its obligations under these specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's.

8. The Contractor is required to provide equal employment opportunity for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Fair Employment and Housing Act (Gov. Code, Section 12990 et seq.) if a particular group is employed in a substantially disparate manner.
9. Establishment and implementation of a bona fide affirmative action plan pursuant to Section 8104 (b) of this Chapter shall create a rebuttal presumption that a contractor is in compliance with the requirements of Section 12990 of the Government Code and its implementing regulations.
10. The Contractor shall not use the nondiscrimination standards to discriminate against any person because of race, color, religion, sex, national origin, ancestry, physical handicap, medical condition, marital status or age over 40.
11. The Contractor shall not enter into any subcontract with any person or firm decertified from state contracts pursuant to Government Code Section 12990.
12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and the nondiscrimination clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Government Code Section 12990 and its implementing regulations by the awarding agency. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Government Code Section 12990.
13. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company equal employment opportunity policy is being carried out, to submit reports relating to the provisions hereof as may be required by OCP and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status, (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in any easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

NOTE: Authority cited: Sections 12935(a) and 12990(d), Government Code. References: Section 12990, Government Code.

7-1.01A(5) Apprentices

Attention is directed to Sections 1777.5, 1777.6 and 1777.7 of the California Labor Code and Title 8, California Code of Regulations Section 200 et seq. To ensure compliance and complete understanding of the law regarding apprentices, and specifically the required ratio thereunder, each contractor or subcontractor should, where some question exists, contact the Division of

Apprenticeship Standards, 455 Golden Gate Avenue, San Francisco, CA 94102, or one of its branch offices prior to commencement of work on the public works contract. Responsibility for compliance with this section lies with the Contractor.

. It is State policy to encourage the employment and training of apprentices on public works contracts as may be permitted under local apprenticeship standards.

7-1.01A(6) Workers' Compensation

. Pursuant to the requirements in Section 1860 of the Labor Code, the Contractor will be required to secure the payment of workers' compensation to the Contractor's employees in conformance with the requirements in Section 3700 of the Labor Code.

. Prior to the commencement of work, the Contractor shall sign and file with the Engineer a certification in the following form:

> "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

. This certification is included in the contract, and signature and return of the contract as provided in Section 3-1.03, "Execution of Contract," shall constitute signing and filing of the certificate.

7-1.01A(7) Suits to Recover Penalties and Forfeitures

. Attention is directed to Sections 1730 to 1733, inclusive, of the Labor Code concerning suits to recover amounts withheld from payment for failure to comply with requirements of the Labor Code or contract provisions based on those laws.

. Those sections provide that a suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the Contractor or the Contractor's assignees with reference to amounts withheld for those penalties or forfeitures; and that the suit must be commenced and actual notice thereof received by the awarding authority prior to 90 days after completion of the contract and the formal acceptance of the job.

. Submission of a claim under Section 9-1.07B, "Final Payment and Claims," for the amounts withheld from payment for those penalties and forfeitures is not a prerequisite for those suits, and these claims will not be considered.

7-1.01B Fair Labor Standards Act

. The attention of bidders is invited to the fact that the State of California, Department of Transportation, has been advised by the Wage and Hour Division, U.S. Department of Labor, that contractors engaged in highway construction work are required to meet the provisions of the Fair Labor Standards Act of 1938 and as amended (52 Stat. 1060).

7-1.01C Contractor's Licensing Laws

. Attention is directed to the provisions of Chapter 9 of Division 3 of the Business and Professions Code concerning the licensing of contractors.

. All bidders and contractors shall be licensed in accordance with the laws of this State and any bidder or contractor not so licensed is subject to the penalties imposed by those laws.

. Attention is also directed to the requirements in Public Contract Code Section 10164. In all projects where Federal funds are involved, the Contractor shall be properly licensed at the time the contract is awarded.

7-1.01D Vehicle Code

. Pursuant to the authority contained in Vehicle Code Section 591, the Department has determined that within those areas that are within the limits of the project and are open to public traffic, the Contractor shall comply with all the requirements set forth in Divisions 11, 12, 13, 14 and 15 of the Vehicle Code.

. Attention is directed to the statement in Vehicle Code Section 591 that this section shall not relieve the Contractor or any person from the duty of exercising due care. The Contractor shall take all necessary precautions for safe operation of the Contractor's equipment and the protection of the public from injury and damage from the Contractor's equipment.

7-1.01E Trench Safety

. Attention is directed to the requirements in Section 6705 of the Labor Code concerning trench excavation safety plans.

7-1.01F Air Pollution Control

. The Contractor shall comply with all air pollution control rules, regulations, ordinances and statutes which apply to any work performed pursuant to the contract, including any air pollution control rules, regulations, ordinances and statutes, specified in Section 11017 of the Government Code.

. Unless otherwise provided in the special provisions, material to be disposed of shall not be burned, either inside or outside the highway right of way.

7-1.01G Water Pollution

. The Contractor shall exercise every reasonable precaution to protect streams, lakes, reservoirs, bays, and coastal waters from pollution with fuels, oils, bitumens, calcium chloride and other harmful materials and shall conduct and schedule operations so as to avoid or minimize muddying and silting of streams, lakes, reservoirs, bays and coastal waters. Care shall be exercised to preserve roadside vegetation beyond the limits of construction.

. Water pollution control work is intended to provide prevention, control and abatement of water pollution to streams, waterways and other bodies of water, and shall consist of constructing those facilities which may be shown on the plans, specified herein or in the special provisions, or directed by the Engineer.

. In order to provide effective and continuous control of water pollution it may be necessary for the Contractor to perform the contract work in small or multiple units, on an out of phase schedule, and with modified construction procedures. The Contractor shall provide temporary water pollution control measures, including but not limited to, dikes, basins, ditches, and applying straw and seed, which become necessary as a result of the Contractor's operations. The Contractor shall coordinate water pollution control work with all other work done on the contract.

. Before starting any work on the project, the Contractor shall submit, for acceptance by the Engineer, a program to control water pollution effectively during construction of the project. The program shall show the schedule for the erosion control work included in the contract and for all water pollution control measures which the Contractor proposes to take in connection with construction of the project to minimize the effects of the operations upon adjacent streams and other bodies of water. The Contractor shall not perform any clearing and grubbing or earthwork on the project, other than that specifically authorized in writing by the Engineer, until the program has been accepted.

. If the measures being taken by the Contractor are inadequate to control water pollution effectively, the Engineer may direct the Contractor to revise the operations and the water pollution control program. The directions will be in writing and will specify the items of work for which the Contractor's water pollution control measures are inadequate. No further work shall be performed on those items until the water pollution control measures are adequate and, if also required, a revised water pollution control program has been accepted.

. The Engineer will notify the Contractor of the acceptance or rejection of any submitted or revised water pollution control program in not more than 5 working days.

. The State will not be liable to the Contractor for failure to accept all or any portion of an originally submitted or revised water pollution control program, nor for any delays to the work due to the Contractor's failure to submit an acceptable water pollution control program.

. The Contractor may request the Engineer to waive the requirement for submission of a written program for control of water pollution when the nature of the Contractor's operation is such that erosion is not likely to occur. Waiver of this requirement will not relieve the Contractor from responsibility for compliance with the other provisions of this section. Waiver of the requirement for a written program for control of water pollution will not preclude requiring submittal of a written program at a later time if the Engineer deems it necessary because of the effect of the Contractor's operations.

. Unless otherwise approved by the Engineer in writing, the Contractor shall not expose a total area of erosible earth material, which may cause water pollution, exceeding 70 000 m^2 for each separate location, operation or spread of equipment before either temporary or permanent erosion control measures are accomplished.

. Where erosion which will cause water pollution is probable due to the nature of the material or the season of the year, the Contractor's operations shall be so scheduled that permanent erosion control features will be installed concurrently with or immediately following grading operations.

. Nothing in the terms of the contract nor in the provisions in this Section 7-1.01G shall relieve the Contractor of the responsibility for compliance with Sections 5650 and 12015 of the Fish and Game Code, or other applicable statutes relating to prevention or abatement of water pollution.

. When borrow material is obtained from other than commercially operated sources, erosion of the borrow site during and after completion of the work shall not result in water pollution. The material source shall be finished, where practicable, so that water will not collect or stand therein.

. The requirements of this section shall apply to all work performed under the contract and to all non-commercially operated borrow or disposal sites used for the project.

. The Contractor shall also conform to the following provisions:

1. Where working areas encroach on live streams, barriers adequate to prevent the flow of muddy water into streams shall be constructed and maintained between working areas and streams, and during construction of the barriers, muddying of streams shall be held to a minimum.
2. Removal of material from beneath a flowing stream shall not be commenced until adequate means, such as a bypass channel, are provided to carry the stream free from mud or silt around the removal operations.
3. Should the Contractor's operations require transportation of materials across live streams, the operations shall be conducted without muddying the stream. Mechanized equipment

shall not be operated in the stream channels of the live streams except as may be necessary to construct crossings or barriers and fills at channel changes.

4. Water containing mud or silt from aggregate washing or other operations shall be treated by filtration, or retention in a settling pond, or ponds, adequate to prevent muddy water from entering live streams.
5. Oily or greasy substances originating from the Contractor's operations shall not be allowed to enter or be placed where they will later enter a live stream.
6. Portland cement or fresh portland cement concrete shall not be allowed to enter flowing water of streams.
7. When operations are completed, the flow of streams shall be returned as nearly as possible to a meandering thread without creating possible future bank erosion, and settling pond sites shall be graded so they will drain and will blend in with the surrounding terrain.
8. Material derived from roadway work shall not be deposited in a live stream channel where it could be washed away by high stream flows.
9. Where there is possible migration of anadromous fish in streams affected by construction on the project, the Contractor shall conduct work operations so as to allow free passage of the migratory fish.

. Compliance with the provisions in this section shall in no way relieve the Contractor from the responsibility to comply with the other provisions of the contract, in particular the responsibility for damage and for preservation of property.

. Full compensation for conforming to the provisions in this section shall be considered as included in the prices paid for the various items of work and no additional compensation will be allowed therefor.

7-1.01H Use of Pesticides

. The Contractor shall comply with all rules and regulations of the Department of Food and Agriculture, the Department of Health, the Department of Industrial Relations and all other agencies which govern the use of pesticides required in the performance of the work on the contract.

. Pesticides shall include but shall not be limited to herbicides, insecticides, fungicides, rodenticides, germicides, nematocides, bactericides, inhibitors, fumigants, defoliants, desiccants, soil sterilants and repellents.

. Any substance or mixture of substances intended for preventing, repelling, mitigating, or destroying weeds, insects, diseases, rodents, or nematodes and any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant shall be considered a pesticide.

7-1.01I Sound Control Requirements

. The Contractor shall comply with all local sound control and noise level rules, regulations and ordinances which apply to any work performed pursuant to the contract.

. Each internal combustion engine, used for any purpose on the job or related to the job, shall be equipped with a muffler of a type recommended by the manufacturer. No internal combustion engine shall be operated on the project without the muffler.

7-1.01J Assignment of Antitrust Actions

The Contractor's attention is directed to the following requirements in Public Contract Code 7103.5 and Government Code Sections 4553 and 4554, which shall be applicable to the Contractor and the Contractor's subcontractors:

"In entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, the contractor or subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the contractor, without further acknowledgment by the parties.

"If an awarding body or public purchasing body receives, either through judgment or settlement, a monetary recovery for a cause of action assigned under this chapter, the assignor shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the public body any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the public body as part of the bid price, less the expenses incurred in obtaining that portion of the recovery.

"Upon demand in writing by the assignor, the assignee shall, within one year from such demand, reassign the cause of action assigned under this part if the assignor has been or may have been injured by the violation of law for which the cause of action arose and (a) the assignee has not been injured thereby, or (b) the assignee declines to file a court action for the cause of action."

7-1.03 PAYMENT OF TAXES

The contract prices paid for the work shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by Federal, State or local government, including, without being limited to, Federal excise tax. No tax exemption certificate nor any document designed to exempt the Contractor from payment of any tax will be furnished to the Contractor by the Department, as to any tax on labor, services, materials, transportation, or any other items furnished pursuant to the contract.

9-1.02 SCOPE OF PAYMENT

. The Contractor shall accept the compensation provided in the contract as full payment for furnishing all labor, materials, tools, equipment, and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contract; also for loss or damage arising from the nature of the work, or from the action of the elements, or from any unforeseen difficulties which may be encountered during the prosecution of the work until the acceptance by the Director and for all risks of every description connected with the prosecution of the work, also for all expenses incurred in consequence of the suspension or discontinuance of the work as provided in the contract; and for completing the work according to the plans and specifications. Neither the payment of any estimate nor of any retained percentage shall relieve the Contractor of any obligation to make good any defective work or material.

. No compensation will be made in any case for loss of anticipated profits.

The facilitator shall be a Certified Value Specialist (CVS) as recognized by the Society of American Value Engineers (SAVE) International, which may be contacted as follows:

SAVE International, 60 Revere Drive, Northbrook, IL 60062
Telephone 1-847-480-1730, FAX 1-847-480-9282

In addition to the above provisions relative to the semi-annual "SFOBB Corridor Value Analysis" workshop, the Contractor may submit to the Engineer, in writing, a request for a project-specific "Value Analysis" workshop with no other corridor construction contractors in attendance. To maximize the potential benefits of a workshop, the request should be submitted to the Engineer early in the project after approval of the contract.

The Contractor may submit recommendations resulting from a "Value Analysis" workshop for approval by the Engineer as cost reduction incentive proposals in conformance with the provisions in Section 5-1.14, "Cost Reduction Incentive," of the Standard Specifications.

The costs involved in providing the "Value Analysis" facilitator and workshop site for the semi-annual "SFOBB Corridor Value Analysis" workshop shall be borne by the State in conformance with the provisions in Section 9-1.03B, "Work Performed by Special Forces or Other Special Services," of the Standard Specifications, except no markups will be allowed.

The costs involved in providing the "Value Analysis" facilitator and workshop site for the project-specific "Value Analysis" workshop shall be borne equally by the State and the Contractor. The division of cost will be made by determining the cost in providing the "Value Analysis" facilitator and workshop site in conformance with the provisions in Section 9-1.03B, "Work Performed by Special Forces or Other Special Services," of the Standard Specifications, and paying to the Contractor one-half of that cost, except no markups will be allowed.

All other costs including, but not limited to, wages and travel expenses, associated with the semi-annual "SFOBB Corridor Value Analysis" workshop and "Value Analysis" workshop will be borne separately by the party incurring the costs, and no additional compensation will be allowed therefor.

5-1.12 DISPUTE REVIEW BOARD

GENERAL

To assist in the resolution of disputes or potential claims arising out of the work of this project, a Dispute Review Board, hereinafter referred to as the "DRB," shall be established by the Engineer and Contractor cooperatively upon approval of the contract. The DRB is intended to assist the contract administrative claims resolution process as specified in the provisions in Section 9-1.04, "Notice of Potential Claim," and Section 9-1.07B, "Final Payment and Claims," of the Standard Specifications and these special provisions. The DRB shall not serve as a substitute for provisions in the specifications in regard to filing potential claims. The requirements and procedures established in this section shall be a prerequisite to filing a claim, filing for arbitration, or filing for litigation prior or subsequent to project completion.

The DRB shall be utilized when dispute or potential claim resolution at the project level is unsuccessful. The DRB shall function as specified herein until the day of acceptance of the contract, at which time the work of the DRB will cease except for completion of unfinished reports. No DRB dispute meetings shall take place later than 30 days prior to acceptance of contract. After acceptance of contract, disputes or potential claims which have followed the dispute resolution processes of the Standard Specifications and these special provisions, but have not been resolved, shall be stated or restated by the Contractor, in response to the Proposed Final Estimate within the time limits provided in Section 9-1.07B, "Final Payment and Claims," of the Standard Specifications. The State will review those claims in conformance with the provisions in Section 9-1.07B of the Standard Specifications. Following the adherence to and completion of the contractual administrative claims procedure, the Contractor may file for arbitration in conformance with the provisions in Section 9-1.10, "Arbitration," of the Standard Specifications and these special provisions.

Disputes, as used in this section, shall include differences of opinion, properly noticed as provided hereinafter, between the State and Contractor on matters related to the work and other subjects considered by the State or Contractor, or by both, to be of concern to the DRB on this project, except matters relating to Contractor, subcontractor or supplier potential claims not actionable against the Department as specified in these special provisions or quantification of disputes for overhead type expenses or costs. Disputes for overhead type expenses or costs shall conform to the requirements of Section 9-1.07B, "Final Payment and Claims," of the Standard Specifications. Whenever the term "dispute" or "disputes" is used herein, it shall be deemed to include potential claims as well as disputes.

The DRB shall serve as an advisory body to assist in the resolution of disputes between the State and the Contractor, hereinafter referred to as the "parties." The DRB shall consider disputes referred to it, and furnish written reports containing findings and recommendations pertaining to those disputes, to the parties to aid in resolution of the differences between them. DRB findings and recommendations are not binding on the parties.

SELECTION PROCESS, DISCLOSURE AND APPOINTMENTS

The DRB shall consist of one member selected by the State and approved by the Contractor, one member selected by the Contractor and approved by the State, and a third member selected by the first 2 members and approved by both the State and the Contractor. The third member shall act as the DRB Chairperson.

DRB members shall be especially knowledgeable in the type of construction and contract documents potentially anticipated by the contract. DRB members shall discharge their responsibilities impartially as an independent body, considering the facts and circumstances related to the matters under consideration, pertinent provisions of the contract and applicable laws and regulations.

The State and the Contractor shall nominate and approve DRB members in conformance with the terms and conditions of the Dispute Review Board Agreement and these special provisions, within 45 days of the approval of the contract. Each party shall provide written notification to the other of the name of their selected DRB nominee along with the prospective member's complete written disclosure statement.

Disclosure statements shall include a resume of the prospective member's experience and a declaration statement describing past, present, anticipated, and planned relationships, including indirect relationships through the prospective member's primary or full-time employer, to this project and with the parties involved in this construction contract, including but not limited to, relevant subcontractors or suppliers to the parties, parties' principals, or parties' counsel. DRB members shall also include a full disclosure of close professional or personal relationships with all key members of the contract. Objections to nominees must be based on a specific breech or violation of nominee responsibilities or on nominee qualifications under these provisions unless otherwise specified. The Contractor or the State may, on a one-time basis, object to the other's nominee without specifying a reason and this person will not be selected for the DRB. Another person shall then be nominated within 15 days.

The first duty of the State and Contractor selected members of the DRB shall be to select and recommend a prospective third DRB member to the parties for final selection and approval. The first 2 DRB members shall proceed with the selection of the third DRB member immediately upon receiving written notification from the State of their selection, and shall provide their recommendation simultaneously to the parties within 15 days of the notification.

The first 2 DRB members shall select a third DRB member subject to mutual approval of the parties or may mutually concur on a list of potentially acceptable third DRB members and submit the list to the parties for final selection and approval of the third member. The goal in the selection of the third member is to complement the professional experience of the first 2 members and to provide leadership for the DRB's activities.

The third prospective DRB member shall supply a full disclosure statement to the first 2 DRB members and to the parties prior to appointment.

An impasse shall be considered to have been reached if the parties are unable to approve a third member within 15 days of receipt of the recommendation of the first 2 DRB members, or if the first 2 DRB members are unable to agree upon a recommendation within their 15 day time limit. In the event of an impasse in selection of third DRB member the State and the Contractor shall each propose 3 candidates for the third DRB member position. The parties shall select the candidates proposed under this paragraph from the current list of arbitrators certified by the Public Works Contract Arbitration Committee created by Article 7.2 (commencing with Section 10245) of the State Contract Act. The first 2 DRB members shall then select one of the 6 proposed candidates in a blind draw.

No DRB member shall have prior direct involvement in this contract. No member shall have a financial interest in this contract or the parties thereto, within a period of 6 months prior to award of this contract or during the contract, except as follows:

A. Compensation for services on this DRB.
B. Ownership interest in a party or parties, documented by the prospective DRB member, that has been reviewed and determined in writing by the State to be sufficiently insignificant to render the prospective member acceptable to the State.
C. Service as a member of other Dispute Review Boards on other contracts.
D. Retirement payments or pensions received from a party that are not tied to, dependent on or affected by the net worth of the party.
E. The above provisions apply to parties having a financial interest in this contract, including but not limited to contractors, subcontractors, suppliers, consultants, and legal and business services.

The Contractor or the State may reject any of the three DRB members who fail to fully comply at all times with all required employment and financial disclosure conditions of DRB membership as described in the Dispute Review Board Agreement and as specified herein. A copy of the Dispute Review Board Agreement is included in this section.

The Contractor, the State, and the 3 members of the DRB shall complete and adhere to the Dispute Review Board Agreement in administration of this DRB within 15 days of the parties' concurrence in the selection of the third member. No DRB meeting shall take place until the Dispute Review Board Agreement has been signed by all parties. The State

authorizes the Engineer to execute and administer the terms of the Agreement. The person(s) designated by the Contractor as authorized to execute contract change orders shall be authorized to execute and administer the terms of this agreement, or to delegate the authority in writing. The operation of the DRB shall be in conformance with the terms of the Dispute Review Board Agreement.

COMPENSATION

The State and the Contractor shall bear the costs and expenses of the DRB equally. Each DRB member shall be compensated at an agreed rate of $1,200 per day if time spent per meeting, including on-site time plus one hour of travel time, is greater than 4 hours. Each DRB member shall be compensated at an agreed rate of $700 per day if time spent per meeting, including on-site time plus one hour of travel time, is less than or equal to 4 hours. The agreed rates shall be considered full compensation for on-site time, travel expenses, transportation, lodging, time for travel and incidentals for each day, or portion thereof, that the DRB member is at an authorized DRB meeting. No additional compensation will be made for time spent by DRB members in review and research activities outside the official DRB meetings unless that time, (such as time spent evaluating and preparing recommendations on specific issues presented to the DRB), has been specifically agreed to in advance by the State and Contractor. Time away from the project, which has been specifically agreed to in advance by the parties, will be compensated at an agreed rate of $125 per hour. The agreed amount of $125 per hour shall include all incidentals including expenses for telephone, fax, and computer services. Members serving on more than one DRB involving the Department, regardless of the number of meetings per day, shall not be paid more than the all inclusive rate per day or rate per hour for an individual project. The State will provide, at no cost to the Contractor, administrative services such as conference facilities and secretarial services to the DRB. These special provisions and the Dispute Review Board Agreement state the provisions for compensation and expenses of the DRB. DRB members shall be compensated at the same daily and hourly rate. The Contractor shall make direct payments to each DRB member for their participation in authorized meetings and approved hourly rate charges from invoices submitted by each DRB member. The State will reimburse the Contractor for the State's share of the costs. There will be no markups applied to expenses connected with the DRB, either by the DRB members or by the Contractor when requesting payment of the State's share of DRB expenses. Regardless of the DRB recommendation, neither party shall be entitled to reimbursement of DRB costs from the other party.

REPLACEMENT OF DRB MEMBERS

Service of a DRB member may be terminated at any time with not less than 15 days notice as follows:

A. The State may terminate service of the State appointed member.
B. The Contractor may terminate service of the Contractor appointed member.
C. Upon the written recommendation of the State and Contractor appointed members for the removal of the third member.
D. Upon resignation of a member.
E. The State or Contractor may terminate the service of any member who fails to fully comply with all required employment and financial disclosure conditions of DRB membership

When a member of the DRB is replaced, the replacement member shall be appointed in the same manner as the replaced member was appointed. The appointment of a replacement DRB member will begin promptly upon determination of the need for replacement and shall be completed within 15 days. Changes in either of the DRB members chosen by the two parties will not require re-selection of the third member, unless both parties agree to such re-selection in writing. The Dispute Review Board Agreement shall be amended to reflect the change of a DRB member.

OPERATION

The following procedure shall be used for dispute resolution:

A. If the Contractor objects to any decision, act or order of the Engineer, the Contractor shall give written notice of potential claim in conformance with the provisions in Section 9-1.04, "Notice of Potential Claim," of the Standard Specifications and these special provisions, including the provision of applicable cost documentation; or file written protests or notices in conformance with the provisions in the Standard Specifications and these special provisions.
B. The Engineer will respond, in writing, to the Contractor's written supplemental notice of potential claim within 20 days of receipt of the notice.
C. Within 15 days after receipt of the Engineer's written response, the Contractor shall, if the Contractor still objects, file a written reply with the Engineer, stating clearly and in detail the basis of the objection.
D. Following an objection to the Engineer's written response, the Contractor shall refer the dispute to the DRB if the Contractor wishes to further pursue the objection to the Engineer's decision. The Contractor shall make the referral

in writing to the DRB, simultaneously copied to the State, within 21 days after receipt of the written response from the Engineer. The written dispute referral shall describe the disputed matter in individual discrete segments so that it will be clear to both parties and the DRB what discrete elements of the dispute have been resolved, and which remain unresolved, and shall include an estimate of the cost of the affected work and impacts, if any, on project completion.

E. By failing to submit the written notice of referral to the DRB, within 21 days after receipt of the Engineer's written response to the supplemental notice of potential claim, the Contractor waives future claims and arbitration on the matter in contention.

F. The Contractor and the State shall each be afforded an opportunity to be present and to be heard by the DRB, and to offer evidence. Either party furnishing written evidence or documentation to the DRB must furnish copies of such information to the other party a minimum of 15 days prior to the date the DRB is scheduled to convene the meeting for the dispute. Either party shall produce such additional evidence as the DRB may deem necessary to reach an understanding and a determination of the dispute. The party furnishing additional evidence shall furnish copies of such additional evidence to the other party at the same time the evidence is provided to the DRB. The DRB shall not consider evidence not furnished in conformance with the terms specified herein.

G. Upon receipt by the DRB of a written referral of a dispute, the DRB shall convene to review and consider the dispute. The dispute meeting shall be held no earlier than 30 days and no later than 60 days after receipt of the written referral unless otherwise agreed to by all parties. The DRB shall determine the time and location of the DRB dispute meeting, with due consideration for the needs and preferences of the parties while recognizing the paramount importance of a timely hearing of the dispute.

H. There shall be no participation of either party's attorneys at DRB dispute meetings.

I. There shall be no participation of persons who are not directly involved in the contract or who do not have direct knowledge of the dispute, including but not limited to consultants, except for expert testimony allowed at the discretion of the DRB and with approval prior to the dispute meeting by both parties.

J. The DRB shall furnish a report, containing findings and recommendations as described in the Dispute Review Board Agreement, in writing to both the State and the Contractor. The DRB may request clarifying information of either party within 10 days after the DRB dispute meeting. Requested information shall be submitted to the DRB within 10 days of the DRB request. The DRB shall complete its report, including minority opinion, if any, and submit it to the parties within 30 days of the DRB dispute meeting, except that time extensions may be granted at the request of the DRB with the written concurrence of both parties. The report shall include the facts and circumstances related to the matters under consideration, pertinent provisions of the contract, applicable laws and regulations, and actual costs and time incurred as shown on the Contractor's cost accounting records. The DRB shall make recommendations on the merit of the dispute and, if appropriate, recommend guidelines for determining compensation.

K. Within 30 days after receiving the DRB's report, both the State and the Contractor shall respond to the DRB in writing signifying that the dispute is either resolved or remains unresolved. Failure to provide the written response within the time specified, or a written rejection of the DRB's recommendation or response to a request for reconsideration presented in the report by either party, shall conclusively indicate that the party(s) failing to respond accepts the DRB recommendation. Immediately after responses have been received from both parties, the DRB shall provide copies of both responses to the parties simultaneously. Either party may request clarification of elements of the DRB's report from the DRB prior to responding to the report. The DRB shall consider any clarification request only if submitted within 10 days of receipt of the DRB's report, and if submitted simultaneously in writing to both the DRB and the other party. Each party may submit only one request for clarification for any individual DRB report. The DRB shall respond, in writing, to requests for clarification within 10 days of receipt of such requests.

L. The DRB's recommendations, stated in the DRB's reports, are not binding on either party. Either party may seek a reconsideration of a recommendation of the DRB. The DRB shall only grant a reconsideration based upon submission of new evidence and if the request is submitted within the 30-day time limit specified for response to the DRB's written report. Each party may submit only one request for reconsideration regarding an individual DRB recommendation.

M. If the State and the Contractor are able to resolve their dispute with the aid of the DRB's report, the State and Contractor shall promptly accept and implement the recommendations of the DRB. If the parties cannot agree on compensation within 60 days of the acceptance by both parties of the DRB's recommendation, either party may request the DRB to make a recommendation regarding compensation.

N. The State or the Contractor shall not call DRB members who served on the DRB for this contract as witnesses in arbitration proceedings which may arise from this contract, and all documents created by the DRB shall be inadmissible as evidence in subsequent arbitration proceedings, except the DRB's final written reports on each issue brought before it.

O. The State and Contractor shall jointly indemnify and hold harmless the DRB members from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of and resulting from the findings and recommendations of the DRB.
P. The DRB members shall have no claim against the State or the Contractor, or both, from claimed harm arising out of the parties' evaluations of the DRB's report.

DISPUTES INVOLVING SUBCONTRACTOR POTENTIAL CLAIMS

For purposes of this section, a "subcontractor potential claim" shall include any potential claim by a subcontractor (including also any pass through potential claims by a lower tier subcontractor or supplier) against the Contractor that is actionable by the Contractor against the Department which arises from the work, services, or materials provided or to be provided in connection with the contract. If the Contractor determines to pursue a dispute against the Department that includes a subcontractor potential claim, the dispute shall be processed and resolved in conformance with these special provisions and in conformance with the following:

A. The Contractor shall identify clearly in submissions pursuant to this section, that portion of the dispute that involves a subcontractor potential claim or potential claims.
B. The Contractor shall include, as part of its submission pursuant to Step D above, a certification (False Claims Act Certification) by the subcontractor's or supplier's officer, partner, or authorized representative with authority to bind the subcontractor and with direct knowledge of the facts underlying the subcontractor potential claim. The Contractor shall submit a certification that the subcontractor potential claim is acknowledged and forwarded by the Contractor. The form for these certifications is available from the Engineer.
C. At DRB dispute meetings involving one or more subcontractor potential claims, the Contractor shall require that each subcontractor involved in the dispute have present an authorized representative with actual knowledge of the facts underlying the subcontractor potential claim to assist in presenting the subcontractor potential claim and to answer questions raised by the DRB members or the Department's representatives.
D. Failure by the Contractor to declare a subcontractor potential claim on behalf of its subcontractor (including lower tier subcontractors' and suppliers' pass through potential claims) at the time of submission of the Contractor's potential claims, as provided hereunder, shall constitute a release of the State by the Contractor of such subcontractor potential claim.
E. The Contractor shall include in all subcontracts under this contract that subcontractors and suppliers of any tier (a) agree to submit subcontractor potential claims to the Contractor in a proper form and in sufficient time to allow processing by the Contractor in conformance with the Dispute Review Board resolution specifications; (b) agree to be bound by the terms of the Dispute Review Board provisions to the extent applicable to subcontractor potential claims; (c) agree that, to the extent a subcontractor potential claim is involved, completion of all steps required under these Dispute Review Board special provisions shall be a condition precedent to pursuit by the subcontractor of other remedies permitted by law, including without limitation of a lawsuit against the Contractor; and (d) agree that the existence of a dispute resolution process for disputes involving subcontractor potential claims shall not be deemed to create any claim, right, or cause of action by any subcontractor or supplier against the Department.

Notwithstanding the foregoing, this Dispute Review Board special provision shall not apply to, and the DRB shall not have the authority to consider, subcontractor potential claims between the subcontractor(s) or supplier(s) and the Contractor that are not actionable by the Contractor against the Department.

RETENTION

Failure of the Contractor to nominate and approve DRB members in conformance with the terms and conditions of the Dispute Review Board Agreement and these special provisions shall result in the retention of 25 percent of the estimated value of all work performed during each estimate period in which the Contractor fails to comply with the requirements of this section as determined by the Engineer. DRB retentions will be released for payment on the next monthly estimate for partial payment following the date that the Contractor has nominated and approved DRB members and no interest will be due the Contractor.

DISPUTE REVIEW BOARD AGREEMENT

A copy of the "Dispute Review Board Agreement" to be executed by the Contractor, State and the 3 DRB members after approval of the contract follows:

Form 6202 Rev (09/01/02)

DISPUTE REVIEW BOARD AGREEMENT

_____
(Contract Identification)

Contract No. _____

THIS DISPUTE REVIEW BOARD AGREEMENT, hereinafter called "AGREEMENT", made and entered into this _____ day of _____, _____, between the State of California, acting through the California Department of Transportation and the Director of Transportation, hereinafter called the "STATE," _____ _____ hereinafter called the "CONTRACTOR," and the Dispute Review Board, hereinafter called the "DRB" consisting of the following members:

_____,
(Contractor Appointee)

_____,
(State Appointee)

and _____
(Third Person)

WITNESSETH, that

WHEREAS, the STATE and the CONTRACTOR, hereinafter called the "parties," are now engaged in the construction on the State Highway project referenced above; and

WHEREAS, the special provisions for the above referenced contract provides for the establishment and operation of the DRB to assist in resolving disputes; and

WHEREAS, the DRB is composed of three members, one selected by the STATE, one selected by the CONTRACTOR, and the third member selected by the other two members and approved by the parties;

NOW THEREFORE, in consideration of the terms, conditions, covenants, and performance contained herein, or attached and incorporated and made a part hereof, the STATE, the CONTRACTOR, and the DRB members hereto agree as follows:

SECTION I DESCRIPTION OF WORK

To assist in the resolution of disputes between the parties, the contract provides for the establishment and the operation of the DRB. The intent of the DRB is to fairly and impartially consider disputes placed before it and provide written recommendations for resolution of these disputes to both parties. The members of this DRB shall perform the services necessary to participate in the DRB's actions as designated in Section II, Scope of Work.

SECTION II SCOPE OF WORK

The scope of work of the DRB includes, but is not limited to, the following:

A. OBJECTIVE

The principal objective of the DRB is to assist in the timely resolution of disputes between the parties arising from performance of this contract. It is not intended for either party to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the DRB. It is intended that the mere existence of the DRB will encourage the parties to resolve disputes without resorting to this review procedure. But when a dispute that is serious enough to warrant the DRB's review does develop, the process for prompt and efficient action will be in place.

B. PROCEDURES

The DRB shall render written reports on disputes between the parties arising from the construction contract. Prior to consideration of a dispute, the DRB shall establish rules and regulations that will govern the conduct of its business and reporting procedures in conformance with the requirements of the contract and the terms of this AGREEMENT. DRB recommendations, resulting from its consideration of a dispute, shall be furnished in writing to both parties. The

recommendations shall be based on facts and circumstances involved in the dispute, pertinent contract provisions, applicable laws and regulations. The recommendations shall find one responsible party in a dispute; shared or "jury" determinations shall not be rendered. The DRB shall make recommendations on the merit of the dispute, and if appropriate, recommend guidelines for determining compensation. If the parties cannot agree on compensation within 60 days of the acceptance by both parties of the DRB's recommendation, either party may request the DRB to make a recommendation regarding compensation.

The DRB shall refrain from officially giving advice or consulting services to anyone involved in the contract. The individual members shall act in a completely independent manner and while serving as members of the DRB shall have no consulting business connections with either party or its principals or attorneys or other affiliates (subcontractors, suppliers, etc.) who have a beneficial interest in the contract.

During scheduled meetings of the DRB as well as during dispute meetings, DRB members shall refrain from expressing opinions on the merits of statements on matters under dispute or potential dispute. Opinions of DRB members expressed in private sessions shall be kept strictly confidential. Individual DRB members shall not meet with, or discuss contract issues with individual parties, except as directed by the DRB Chairperson. Such discussions or meetings shall be disclosed to both parties. Other discussions regarding the project between the DRB members and the parties shall be in the presence of all three members and both parties. Individual DRB members shall not undertake independent investigations of any kind pertaining to disputes or potential disputes, except with the knowledge of both parties and as expressly directed by the DRB Chairperson.

C. CONSTRUCTION SITE VISITS, PROGRESS MEETINGS AND FIELD INSPECTIONS

The DRB members shall visit the project site and meet with representatives of the parties to keep abreast of construction activities and to develop familiarity with the work in progress. Scheduled progress meetings shall be held at or near the project site. The DRB shall meet at least once at the start of the project, and at least once every 4 months thereafter. The frequency, exact time, and duration of additional site visits and progress meetings shall be as recommended by the DRB and approved by the parties consistent with the construction activities or matters under consideration and dispute. Each meeting shall consist of a round table discussion and a field inspection of the work being performed on the contract, if necessary. Each meeting shall be attended by representatives of both parties. The agenda shall generally be as follows:

1. Meeting opened by the DRB Chairperson.
2. Remarks by the STATE's representative.
3. A description by the CONTRACTOR's representative of work accomplished since the last meeting; the current schedule status of the work; and a forecast for the coming period.
4. An outline by the CONTRACTOR's representative of potential problems and a description of proposed solutions.
5. An outline by the STATE's representative of the status of the work as the STATE views it.
6. A brief description by the CONTRACTOR's or STATE's representative of potential claims or disputes which have surfaced since the last meeting.
7. A summary by the STATE's representative, the CONTRACTOR's representative, or the DRB of the status of past disputes and potential claims.

The STATE's representative will prepare minutes of all progress meetings and circulate them for revision and approval by all concerned within 10 days of the meeting.

The field inspection shall cover all active segments of the work, the DRB being accompanied by both parties' representatives. The field inspection may be waived upon mutual agreement of the parties.

D. DRB CONSIDERATION AND HANDLING OF DISPUTES

Upon receipt by the DRB of a written referral of a dispute, the DRB shall convene to review and consider the dispute. The dispute meeting shall be held no earlier than 30 days and no later than 60 days after receipt of the written referral, unless otherwise agreed to by all parties. The DRB shall determine the time and location of DRB dispute meetings, with due consideration for the needs and preferences of the parties while recognizing the paramount importance of speedy resolution of issues. No dispute meetings shall take place later than 30 days prior to acceptance of contract.

Normally, dispute meetings shall be conducted at or near the project site. However, any location that would be more convenient and still provide required facilities and access to necessary documentation shall be satisfactory.

Both parties shall be given the opportunity to present their evidence at these dispute meetings. It is expressly understood that the DRB members are to act impartially and independently in the consideration of the contract provisions, applicable laws and regulations, and the facts and conditions surrounding any dispute presented by either party, and that the recommendations concerning any such dispute are advisory and nonbinding on the parties.

The DRB may request that written documentation and arguments from both parties be sent to each DRB member, through the DRB Chairperson, for review before the dispute meeting begins. A party furnishing written documentation to the

DRB shall furnish copies of such information to the other party at the same time that such information is supplied to the DRB.

DRB dispute meetings shall be informal. There shall be no testimony under oath or cross-examination. There shall be no reporting of the procedures by a shorthand reporter or by electronic means. Documents and verbal statements shall be received by the DRB in conformance with acceptance standards established by the DRB. These standards need not comply with prescribed legal laws of evidence.

The third DRB member shall act as Chairperson for dispute meetings and all other DRB activities. The parties shall have a representative at all dispute meetings. Failure to attend a duly noticed dispute meeting by either of the parties shall be conclusively considered by the DRB as indication that the non-attending party considers written submittals as their entire and complete argument. The claimant shall discuss the dispute, followed by the other party. Each party shall then be allowed one or more rebuttals until all aspects of the dispute are thoroughly covered. DRB members shall ask questions, seek clarification, and request further data from either of the parties as may be necessary to assist in making a fully informed recommendation. The DRB may request from either party documents or information that would assist the DRB in making its findings and recommendations including, but not limited to, documents used by the CONTRACTOR in preparing the bid for the project. A refusal by a party to provide information requested by the DRB may be considered by the DRB as an indication that the requested material would tend to disprove that party's position. In large or complex cases, additional dispute meetings may be necessary in order to consider all the evidence presented by both parties. All involved parties shall maintain the confidentiality of all documents and information, as provided in this AGREEMENT.

During dispute meetings, no DRB member shall express an opinion concerning the merit of any facet of the case. DRB deliberations shall be conducted in private, with interim individual views kept strictly confidential.

After dispute meetings are concluded, the DRB shall meet in private and reach a conclusion supported by 2 or more members. Private sessions of the DRB may be held at a location other than the job site or by electronic conferencing as deemed appropriate, in order to expedite the process.

The DRB's findings and recommendations, along with discussion of reasons therefor, shall then be submitted as a written report to both parties. Recommendations shall be based on the pertinent contract provisions, applicable laws and regulations, and facts and circumstances related to the dispute. The report shall be thorough in discussing the facts considered, the contract language, law or regulation viewed by the DRB as pertinent to the issues, and the DRB's interpretation and philosophy in arriving at its conclusions and recommendations. The DRB's report shall stand on its own, without attachments or appendices. The DRB Chairperson shall furnish a copy of the written recommendation report to the DRB Coordinator, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274.

With prior written approval of both parties, the DRB may obtain technical services necessary to adequately review the disputes presented, including audit, geotechnical, schedule analysis and other services. The parties' technical staff may supply those services as appropriate. The cost of technical services, as agreed to by the parties, shall be borne equally by the 2 parties as specified in an approved contract change order. The CONTRACTOR will not be entitled to markups for the payments made for these services.

The DRB shall resist submittal of incremental portions of information by either party, in the interest of making a fully informed decision and recommendation.

The DRB shall make every effort to reach a unanimous decision. If this proves impossible, the dissenting member shall prepare a minority opinion, which shall be included in the DRB's report.

Although both parties should place weight upon the DRB's recommendations, they are not binding. Either party may appeal a recommendation to the DRB for reconsideration. However, reconsideration shall only be allowed when there is new evidence to present, and the DRB shall accept only one appeal from each party pertaining to an individual DRB recommendation. The DRB shall hear appeals in conformance with the terms described in the Section entitled "Dispute Review Board" in the special provisions.

E. DRB MEMBER REPLACEMENT

Should the need arise to appoint a replacement DRB member, the replacement DRB member shall be appointed in the same manner as the original DRB members were appointed. The selection of a replacement DRB member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 15 days. This AGREEMENT shall be amended to indicate change in DRB membership.

SECTION III CONTRACTOR RESPONSIBILITIES

The CONTRACTOR shall furnish to each DRB member one copy of pertinent documents that are or may become necessary for the DRB to perform their function. Pertinent documents are written notices of potential claim, responses to those notices, drawings or sketches, calculations, procedures, schedules, estimates, or other documents which are used in the performance of the work or in justifying or substantiating the CONTRACTOR's position. The CONTRACTOR shall also furnish a copy of such pertinent documents to the STATE, in conformance with the terms outlined in the special provisions.

SECTION IV STATE RESPONSIBILITIES

The STATE will furnish the following services and items:

A. CONTRACT RELATED DOCUMENTS

The STATE will furnish to each DRB member one copy of Notice to Contractors and Special Provisions, Proposal and Contract, Plans, Standard Specifications, and Standard Plans, change orders, written instructions issued by the STATE to the CONTRACTOR, or other documents pertinent to any dispute that has been referred to the DRB and necessary for the DRB to perform its function.

B. COORDINATION AND SERVICES

The STATE, through the Engineer, will, in cooperation with the CONTRACTOR, coordinate the operations of the DRB. The Engineer will arrange or provide conference facilities at or near the project site and provide secretarial and copying services to the DRB without charge to the CONTRACTOR.

SECTION V TIME FOR BEGINNING AND COMPLETION

Once established, the DRB shall be in operation until the day of acceptance of the contract. The DRB members shall not begin work under the terms of this AGREEMENT until authorized in writing by the STATE.

SECTION VI PAYMENT

A. ALL INCLUSIVE RATE PAYMENT

The STATE and the CONTRACTOR shall bear the costs and expenses of the DRB equally. Each DRB member shall be compensated at an agreed rate of $1,200 per day if time spent per meeting, including on-site time plus one hour of travel time, is greater than 4 hours. Each DRB member shall be compensated at an agreed rate of $700 per day if time spent per meeting, including on-site time plus one hour of travel time, is less than or equal to 4 hours. The agreed rates shall be considered full compensation for on-site time, travel expenses, transportation, lodging, time for travel and incidentals for each day, or portion thereof, that the DRB member is at an authorized DRB meeting. No additional compensation will be made for time spent by DRB members in review and research activities outside the official DRB meetings unless that time has been specifically agreed to in advance by the STATE and CONTRACTOR. Time away from the project that has been specifically agreed to in advance by the parties will be compensated at an agreed rate of $125 per hour. The agreed amount of $125 per hour shall include all incidentals including expenses for telephone, fax, and computer services. Members serving on more than one DRB involving the State, regardless of the number of meetings per day, shall not be paid more than the all inclusive rate per day or rate per hour for an individual project. The STATE will provide, at no cost to the CONTRACTOR, administrative services such as conference facilities and secretarial services to the DRB.

B. PAYMENTS

DRB members shall be compensated at the same rate. The CONTRACTOR shall make direct payments to each DRB member for their participation in authorized meetings and approved hourly rate charges from invoices submitted by each DRB member. The STATE will reimburse the CONTRACTOR for its share of the costs of the DRB.

The DRB members may submit invoices to the CONTRACTOR for partial payment for work performed and services rendered for their participation in authorized meetings not more often than once per month during the progress of the work. The invoices shall be in a format approved by the parties and accompanied by a general description of activities performed during that billing period. Payment for hourly fees, at the agreed rate, shall not be paid to a DRB member until the amount and extent of those fees are approved by the STATE and CONTRACTOR.

Invoices shall be accompanied by original supporting documents, which the CONTRACTOR shall include with the extra work billing when submitting for reimbursement of the STATE's share of cost from the STATE. The CONTRACTOR will be reimbursed for one-half of approved costs of the DRB. No markups will be added to the CONTRACTOR's payment.

C. INSPECTION OF COSTS RECORDS

The DRB members and the CONTRACTOR shall keep available for inspection by representatives of the STATE and the United States, for a period of 3 years after final payment, the cost records and accounts pertaining to this AGREEMENT. If any litigation, claim, or audit arising out of, in connection with, or related to this contract is initiated before the expiration of the 3-year period, the cost records and accounts shall be retained until such litigation, claim, or audit involving the records is completed.

SECTION VII ASSIGNMENT OF TASKS OF WORK

The DRB members shall not assign the work of this AGREEMENT.

SECTION VIII TERMINATION OF DRB MEMBERS

DRB members may resign from the DRB by providing not less than 15 days written notice of the resignation to the STATE and CONTRACTOR. DRB members may be terminated by their original appointing power or by either party, for failing to fully comply at all times with all required employment and financial disclosure conditions of DRB membership in conformance with the terms of the contract.

SECTION IX LEGAL RELATIONS

The parties hereto mutually understand and agree that the DRB member in the performance of duties on the DRB, is acting in the capacity of an independent agent and not as an employee of either party.

No party to this AGREEMENT shall bear a greater responsibility for damages or personal injury than is normally provided by Federal or State of California Law.

Notwithstanding the provisions of this contract that require the CONTRACTOR to indemnify and hold harmless the STATE, the parties shall jointly indemnify and hold harmless the DRB members from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of and resulting from the findings and recommendations of the DRB.

SECTION X CONFIDENTIALITY

The parties hereto mutually understand and agree that all documents and records provided by the parties in reference to issues brought before the DRB, which documents and records are marked "Confidential - for use by the DRB only," shall be kept in confidence and used only for the purpose of resolution of subject disputes, and for assisting in development of DRB findings and recommendations; that such documents and records will not be utilized or revealed to others, except to officials of the parties who are authorized to act on the subject disputes, for any purposes, during the life of the DRB. Upon termination of this AGREEMENT, said confidential documents and records, and all copies thereof, shall be returned to the parties who furnished them to the DRB. However, the parties understand that such documents shall be subsequently discoverable and admissible in court or arbitration proceedings unless a protective order has been obtained by the party seeking further confidentiality.

SECTION XI DISPUTES

Disputes between the parties hereto, including disputes between the DRB members and either party or both parties, arising out of the work or other terms of this AGREEMENT, which cannot be resolved by negotiation and mutual concurrence between the parties, or through the administrative process provided in the contract, shall be resolved by arbitration as provided in Section 9-1.10, "Arbitration," of the Standard Specifications.

SECTION XII VENUE, APPLICABLE LAW, AND PERSONAL JURISDICTION

In the event that any party, including an individual member of the DRB, deems it necessary to institute arbitration proceedings to enforce any right or obligation under this AGREEMENT, the parties hereto agree that such action shall be initiated in the Office of Administrative Hearings of the State of California. The parties hereto agree that all questions shall be resolved by arbitration by application of California law and that the parties to such arbitration shall have the right of appeal from such decisions to the Superior Court in conformance with the laws of the State of California. Venue for the arbitration shall be Sacramento or any other location as agreed to by the parties.

SECTION XIII FEDERAL REVIEW AND REQUIREMENTS

On Federal-Aid contracts, the Federal Highway Administration shall have the right to review the work of the DRB in progress, except for private meetings or deliberations of the DRB.

Other Federal requirements in this agreement shall only apply to Federal-Aid contracts.

SECTION XIV CERTIFICATION OF THE CONTRACTOR, THE DRB MEMBERS, AND THE STATE

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the day and year first above written.

DRB MEMBER

By: _____

Title: _____

DRB MEMBER

By: _____

Title: _____

DRB MEMBER

By: _____

Title: _____

CONTRACTOR

By: _____

Title: _____

CALIFORNIA STATE DEPARTMENT OF TRANSPORTATION

By: _____

Title: _____

5-1.13 COMPENSATION ADJUSTMENTS FOR PRICE INDEX FLUCTUATIONS

The provisions of this section shall apply only to the following contract items:

ITEM CODE	ITEM
390102	ASPHALT CONCRETE (TYPE A)

The compensation payable for paving asphalt used in asphalt concrete and asphaltic emulsion (paint binder) will be increased or decreased in conformance with the provisions of this section for paving asphalt price fluctuations exceeding 10 percent (Iu/Ib is greater than 1.10 or less than 0.90) which occur during performance of the work.

The adjustment in compensation will be determined in conformance with the following formulae when the item of asphalt concrete is included in a monthly estimate:

A. Total monthly adjustment = AQ

B. For an increase in paving asphalt price index exceeding 10 percent:

$$A = 0.90\ (1.1023)\ (Iu/Ib - 1.10)\ Ib$$

C. For a decrease in paving asphalt price index exceeding 10 percent:

$$A = 0.90\ (1.1023)\ (Iu/Ib - 0.90)\ Ib$$

D. Where:

A = Adjustment in dollars per tonne of paving asphalt used to produce asphalt concrete rounded to the nearest $0.01.
Iu = The California Statewide Paving Asphalt Price Index which is in effect on the first business day of the month within the pay period in which the quantity subject to adjustment was included in the estimate.
Ib = The California Statewide Paving Asphalt Price Index for the month in which the bid opening for the project occurred.
Q = Quantity in tonnes of paving asphalt that was used in producing the quantity of asphalt concrete shown under "This Estimate" on the monthly estimate using the amount of asphalt determined by the Engineer.

The adjustment in compensation will also be subject to the following:

APPENDIX B

Related Correspondence

MCM CONSTRUCTION, INC.
GENERAL ENGINEERING CONTRACTORS
SACRAMENTO, CA

Main Office
P.O. BOX 620 / 6413 32nd Street / North Highlands / CA 95660
(916) 334-1221 Estimating / Engineering FAX (916) 334-0562
Accounting FAX (916) 334-8355

Southern California Regional Office
P.O. BOX 867 / 19010 Slover Ave. / Bloomington / CA 92316
(909) 875-0533 Engineering / Accounting FAX (909) 875-2243

April 8, 2009

State of California
Department of Transportation
345 Burma Road
Oakland, CA 94607

Attn: Ben Ghafhgazi, R. E.

Re: Contract 04-0120L4
Oakland Touchdown
Notice of Potential Claim No. 10

Gentlemen:

Please consider this letter to be MCM Construction's Notice of Potential Claim No. 10. This Notice of Potential Claim relates to all cost impacts caused by the increase in Sales and Use Tax pursuant to Assembly Bill 3 (AB 3, Chapter 18 of 2009 Statute) as mandated by the State of California.

Section 4-1.03(c), "Changes," of the Standard Specifications allows the Department to make changes to the plans and specifications and to adjust compensation to the contractor accordingly. The passage of AB3 increased the state tax 1.00%, thus at bid time MCM could not have reasonably anticipated the additional costs necessary to complete the project once they were subject to the increased sales and use tax.

The State in their April 2, 2009 Memorandum rely on Standard Specification Sections 9-1.02, "Scope of Payment," and Section 7-1.03, "Payment of Taxes," to hold that that increased sales and use tax costs do not constitute a change in contract provisions. Although Section 7-1.03, "Payment of Taxes" states that full compensation to the contractor for all taxes is included in the contract prices, it does not mean that the contractor necessarily bears the risk of paying for the cost of compliance. Additionally, Section 9-1.02 requires the contractor only to assume the risk of unforeseen difficulties in the work "contemplated and embraced" by the contract. The 1% increase in use and sales tax was not "contemplated or embraced under the contract."

The State of California, as owner has the contractual authority to provide additional compensation for the impacts AB 3 has on project costs. Increased sales and use tax costs as directed by the State constitute a change in contract provisions; therefore the State should compensate the contractor for changes in tax rates.

MCM CONSTRUCTION, INC.
GENERAL ENGINEERING CONTRACTORS
SACRAMENTO, CA

Main Office
P.O. BOX 620 / 6413 32nd Street / North Highlands / CA 95660
(916) 334-1221 Estimating / Engineering FAX (916) 334-0562
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(909) 875-0533 Engineering / Accounting FAX (909) 875-2243

Attached is the Notice of Potential Claim No. 10, Form CEM-6201A, filed in accordance with Section 9-1.04, "Notice of Potential Claim" of the Standard Specifications as amended, for all cost impacts due to MCM and/ or their subcontractors.

Very truly yours,

MCM CONSTRUCTION, INC.

C Smith
For E. Puchi

EDMUNDO A. PUCHI,
Treasurer and General Counsel

cc: Greg Allen
Chris Smith
Richard McCall
NOPC #9 File
JAC
HDM

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION

INITIAL NOTICE OF POTENTIAL CLAIM

CEM-6201A (NEW 9/2002)

FOR STATE USE ONLY	
Received By _____ (For Resident Engineer)	Date _____

TO	CONTRACT NUMBER	DATE	IDENTIFICATION #
Ben Ghafhazi (Resident Engineer)	04-0120L4	April 7, 2009	NOPC 10

This is An Initial Notice of Potential Claim for additional compensation submitted as required under the provisions of Section 9-1.04, "Notice of Potential Claim", of the Standard Specifications.

The act of the Engineer, or his/her failure to act, or the event, thing, occurrence, or other cause giving rise to the potential claim occurred on

DATE April 7, 2009

The particular nature and circumstances of this potential claim are described as follows:

Please see attached letter dated April 7, 2009 for information.

The undersigned originator (Contractor or Subcontractor as appropriate) certifies that the above statements a and attached documents made in full cognizance of the California False Claim Act, Government Code sections 12650 - 12655. The undersigned further understands and agrees that this potential claim to be further considered unless resolved, must fully conform to the requirements in Section 9-1.04 of the Standard Specifications and must be restated as a claim in the Contractor's written statement in conformance with Section 9-1.07B of the Standard Specifications.

MCM Construction, Inc.

Subcontractor of (Contractor)

(Circle One)

(Authorized Representative)

For subcontractor notice of potential claim

This notice of potential claim is acknowledged and forwarded by

MCM CONSTRUCTION, INC.

PRIME CONTRACTOR

(Authorized Representative)

for. E. PUGH

CEM-6201 A (NEW 9/2002)

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STATE OF CALIFORNIA-BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor
DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program
345 Burma Rd.
Oakland, CA 94607
(510) 286-0352, (510) 622-5165 fax

MCM CONSTRUCTION, INC.
6413 32ND STREET
NORTH HIGHLANDS, CA 95660

April 15, 2009

Contract No. 04-0120L4
04-Ala-80-1.6/2.7
Oakland Touchdown
SFOBB-ESSSP

Attn: Mr. Greg Allen
Project Manager

Letter No. 05.03.01-001474

Subject: Response to NOPC No. 10
MCM-TRN-000853R00

Dear Mr. Allen,

We have reviewed MCM's letter dated April 8, 2009 regarding the Notice of Potential Claim No. 10.

MCM bases this claim on Standard Specification 4-1.03, "Changes", presuming that the Department directed an ordered change necessary for the proper completion of the work. The Assembly Bill 3 is not an ordered change to the contract that is necessary for the proper completion of the work. The increased sales and use tax costs do not constitute a change in contract provisions.

Your attention is directed to Standard Specifications sections 9-1.02, "Scope of Payment," and 7-1.03, "Payment of Taxes," which state that full compensation to the contractor for all taxes is included in the contract prices.

In reference to these specifications, the Department has no contractual or legal authority to provide additional compensation regardless of the impacts AB 3 may have on project costs. Your claim No. 10 is therefore denied.

Please be advised that there is another Assembly Bill 1523 that is currently under review by the Committee of Revenue and Taxation that would make further changes to the State sales tax that would be beneficial to contractors with existing contracts. The Department has no objection should MCM wish to postpone the DRB hearing until voting has occurred on this new Bill.

Sincerely,

<<< ORIGINAL SIGNED >>>

Ben Ghafghazi
Resident Engineer

cc:

file: 05.03.01
62.00

MCM CONSTRUCTION, INC.
GENERAL ENGINEERING CONTRACTORS
SACRAMENTO, CA

Main Office
P.O. BOX 620 / 6413 32nd Street / North Highlands / CA 95660
(916) 334-1221 Estimating / Engineering FAX (916) 334-0562
Accounting FAX (916) 334-8355

Southern California Regional Office
P.O. BOX 867 / 19010 Slover Ave. / Bloomington / CA 92316
(909) 875-0533 Engineering / Accounting FAX (909) 875-2243
Email & Mail

April 16, 2009

State of California
Department of Transportation
345 Burma Road
Oakland CA 94607

Attn: Ben Ghafghazi, R. E.

Re: Contract No. 04-0120L4
Bay Bridge Oakland Touchdown
Response to NOPC 10

Gentlemen,

MCM is in receipt of the State's letter dated April 15, 2009 responding to MCM's NOPC 10. We do not agree with the State's position that the Department has no contractual or legal authority to provide additional compensation for the impacts AB 3 has on projects costs. It is our position that the April 1, 2009 sales and use tax increase effectively amounts to an owner initiated change by the State of California, creating an unforeseeable condition and change in the law outside the contemplation of both the parties at the time of contract, therefore the State should compensate the MCM for changes in tax rates.

MCM however agrees to hold the DRB hearing process in abeyance until after the legislature has taken action on the Bill 1523, which may resolve the aforementioned issue.

Very truly yours,

MCM CONSTRUCTION, INC.

GREG ALLEN
Project Manager

CC: E. Puchi
C. Smith
R. McCall
307 File 7.0/16.0

STATE OF CALIFORNIA-BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor
DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program
345 Burma Rd.
Oakland, CA 94607
(510) 286-0352, (510) 622-5165 fax

MCM CONSTRUCTION, INC.
6413 32ND STREET
NORTH HIGHLANDS, CA 95660

November 10, 2009

Contract No. 04-0120L4
04-Ala-80-1.6/2.7
Oakland Touchdown
SFOBB-ESSSP

Attn: Mr. Greg Allen
Project Manager

Letter No. 05.03.01-001718

Subject: Response to NOPC No. 10
MCM-TRN-000853R00, MCM-TRN-000883R00

Dear Mr. Allen,

After further review of MCM's Initial NOPC #10 dated 04/08/09, and MCM's response to State letter 1474, the issue addressed on this NOPC #10 pertains to Assembly Bill 3, which provides for a 1% temporary increase in the statewide sales and use tax, it has been determined that the Department does not have the authority to decide on this dispute.

Further, this issue applies to another Department of the State of California that is responsible for tax collection, the California Board of Equalization, and is external to the contract. The dispute presented via NOPC # 10 did not arise from performance of the contract MCM has with the Department, but rather as a result of the independent governmental action of a sovereign act, the legislature of the State of California.

Please reference Sections 7-1.01, "Laws to be Observed", Section 7-1.03, "Payment of Taxes", and Section 9-1.02, "Scope of Payment", of the Standard Specifications.

Standard Specifications Sections 9-1.02, "Scope of Payment", and 7-1.03, "Payment of Taxes", state that full compensation to the Contractor for all taxes is included in the contract prices. The Department has no contractual authority to provide additional compensation regardless of the impacts AB3 may have on the project costs. Increased sales and use tax costs do not constitute a change in the contract provisions.

Additionally, section 7-1.01, "Laws to be Observed" of the Standard Specifications states that the Contractor shall keep fully informed of all existing and future state and federal laws as well as county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work.

If you wish to pursue the matter further, your attention is directed to the provisions of Section 4-1.03A, "Procedure and Protest", as well as Section 9-1.04, "Notice of Potential Claim" of the Standard Specifications, for the specified dispute procedures. Should MCM wish to schedule a DRB hearing, the formal DRB process will be followed.

Sincerely,

Ben Ghafghazi
Resident Engineer

Contract: 04-0120L4
04-Ala-80-1.6/2.7
Oakland Touchdown

file: 05.03.01
62.00

MCM CONSTRUCTION, INC.
GENERAL ENGINEERING CONTRACTORS
SACRAMENTO, CA

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November 30, 2009

State of California
Department of Transportation
345 Burma Road
Oakland CA 94607

Attn: Ben Ghafghazi, R. E.

Re: Contract No. 04-0120L4
Bay Bridge, Oakland Touchdown 1
NOPC #10

Dear Mr. Ghafghazi:

Reference is made to the State's letter November 10, 2009 (Letter No. 05.03.01-001718) regarding MCM Construction's NOPC #10 related to the 1% increase in Statewide Sales and Use taxes.

MCM Construction, Inc. does not agree with the State's position regarding its responsibility to reimburse the Contractor for the additional costs of material imposed as a result of the 1% increase in Sales and Use taxes.

The Contractor's obligation under this Contract is to perform all WORK. The work related to all items on the Contract includes providing labor and materials. As a result of the 1% increase in Sales tax, the cost of the work has been impacted and therefore should be reimbursed under the terms of the Change In Character and Changes provisions of the Standard Specifications. Although MCM Construction is not willing to waive its rights for reimbursement for this additional cost of material, we do recognize that the Dispute Review Board may not be qualified to review this dispute and render an appropriate recommendation. MCM Construction will not waive its rights under the Notice of Potential Claim and DRB provisions of the Contract.

Accordingly, MCM Construction, Inc. proposes that Caltrans and MCM mutually agree to waive the provisions of the Dispute Review Board requirements under the Contract and agree that MCM reserves its rights to pursue this matter through the Proposed Final Estimate and claims provisions of the Contract. Please advise if Caltrans is willing to enter into such a mutual agreement. We believe this will expedite the process of concluding the Contract and avoid what may be needless costs of the Dispute Review Board procedures.

In the event that Caltrans does not agree with this proposal, please consider this letter as our Notice to the Dispute Review Board that we intend to request that they schedule a hearing on the matter of NOPC #10 related to the temporary increase of State Sales and Use tax.

Thank you for your courtesy and cooperation in this regard.

Very truly yours,

MCM CONSTRUCTION, INC.

EMDUNDO A. PUCHI
Treasurer and General Counsel

Enclosure

cc: Amer Bata, Caltrans
Tony Anziano, Caltrans
Dave McCracken, DRB Chairman, Ron Reading,
DRB Member, Heigo Orav, DRB Member
Greg Allen HDM JAC R. McCall 307 File NPC #10

STATE OF CALIFORNIA-BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Govemor

DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program
345 Burma Rd.
Oakland, CA 94607
(510) 286-0352, (510) 622-5165 fax

MCM CONSTRUCTION, INC.
6413 32ND STREET
NORTH HIGHLANDS, CA 95660

December 21, 2009

Contract No. 04-0120L4
04-Ala-80-1.6/2.7
Oakland Touchdown
SFOBB-ESSSP

Attn: Mr. Greg Allen
Project Manager

Letter No. 05.03.01-001756

Subject: NOPC #10, DRB Hearing
MCM-TRN-001283R00

Dear Mr. Allen,

The Department is in receipt of MCM letter dated November 30, 2009 regarding NOPC #10. The Department does not agree to waive the provisions of the Dispute Review Board requirements as specified in Special Provisions section 5-1.12, "Dispute Review Board."

Your letter of November 30, 2009, and December 8, 2009, serves as notice to the DRB to request that they schedule a hearing on the matter of NOPC #10. A formal hearing can be scheduled with the Dispute Review Board as soon as possible after the quarterly meeting, which is to be held January 7, 2010. Please note that no DRB dispute meetings shall take place later than 30 days prior to acceptance of the contract.

Sincerely,

<<< ORIGINAL SIGNED >>>

Ben Ghafghazi
Resident Engineer

cc:

file: 05.03.01,21.00, 62.00

MCM CONSTRUCTION, INC.
GENERAL ENGINEERING CONTRACTORS
SACRAMENTO, CA

Main Office
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Oakland Touchdown – Site Office
450 Burma Road / Oakland CA 94607

22-Dec-2009 MCM-LTR-000555

Mr. Ben Ghafghazi
Resident Engineer
California Department of Transportation
333 Burma Road,
Oakland, CA 94607, USA

PROJECT: **Oakland Touchdown**
Caltrans Contract No. 04-0120L4
MCM Job No. 307

SUBJECT: **Response to Letter 1756 - NOPC 10 DRB Process**

Gentlemen:

We are in receipt of letter 1756 wherein the state does not agree to waive the provisions of the Dispute Review Board requirements as specified in the Special Provisions Section 5-1.12, "Dispute Review Board."

Please indicate whether or not the state would be willing to discuss this matter informally during our DRB status meeting scheduled for January 7th, 2010. MCM is scheduled to complete contract work mid-March of 2010. We are concerned that there may not be sufficient time to schedule a DRB meeting to resolve this issue prior to the acceptance of the contract.

Should you have any questions, please feel free to call me at 916-919-5323.

Sincerely,

MCM CONSTRUCTION, INC.

<<< ORIGINAL SIGNED >>>
Chris Smith
Project Engineer

cc: 307

File: E. Puchi, G. Allen

STATE OF CALIFORNIA-BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF TRANSPORTATION - District 4 Toll Bridge Program
345 Burma Rd.
Oakland, CA 94607
(510) 286-0352, (510) 622-5165 fax

MCM CONSTRUCTION, INC.
6413 32ND STREET
NORTH HIGHLANDS, CA 95660

January 04, 2010

Contract No. 04-0120L4
04-Ala-80-1.6/2.7
Oakland Touchdown
SFOBB-ESSSP

Attn: Mr. Greg Allen
Project Manager

Letter No. 05.03.01-001765

Subject: NOPC 10 DRB Process Formal Hearing
MCM-LTR-000555

Dear Mr. Allen,

We are in receipt of MCM-LTR-000555 dated December 22, 2009. The Department's position is that this NOPC # 10 warrants a formal hearing by the Dispute Resolution Board. The issue can be added to the agenda for this upcoming Quarterly Meeting on January 7, 2010, for the DRB members to be aware that this will be discussed at a forthcoming hearing.

Please schedule a hearing with the DRB for this NOPC #10 at your earliest convenience.

Sincerely,

<<< ORIGINAL SIGNED >>>

Ben Ghafghazi
Resident Engineer

cc:

file: 05.03.01
21.00, 62.00

APPENDIX C

Exhibits

Assembly Bill No. 3

CHAPTER 18

An act to add Section 99040 to the Government Code, to amend Sections 17041, 17054, and 17062 of, to amend and add Sections 10752 and 10752.1 of, and to add Sections 6051.7, 6201.7, and 10752.2 to, the Revenue and Taxation Code, relating to taxation, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor February 20, 2009. Filed with Secretary of State February 20, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3, Evans. Income taxes: sales and use taxes: vehicle license fees.

The Personal Income Tax Law imposes taxes based upon taxable income. That law also allows credits for personal exemptions, and imposes an alternative minimum tax, as specified.

This bill would, for taxable years beginning on or after January 1, 2009, until either January 1, 2011, or January 1, 2013, as applicable, decrease the amount allowable as a credit for personal exemption for dependents.

This bill would, for taxable years beginning on or after January 1, 2009, and before January 1, 2013, increase the tax rate applicable to taxable income, and increase the alternative minimum tax rate, as provided.

The Vehicle License Fee Law establishes, in lieu of any ad valorem property tax upon vehicles, an annual license fee for any vehicle subject to registration in this state in the amount of 0.65% of the market value of that vehicle, as provided.

This bill would, on and after May 19, 2009, and until July 1, 2013, increase that rate to 1%, for specified vehicles and require that the revenues derived from the increase be deposited into the General Fund.

This bill would also, on and after May 19, 2009, and until July 1, 2013, add a sum equal to 0.15% of the market value of specified vehicles, as determined by the Department of Motor Vehicles, to the vehicle license fee, to be deposited in the General Fund and transferred to the Local Safety and Protection Account, which this bill would create in the Transportation Tax Fund. This bill would continuously appropriate all moneys in the account to the Controller for allocation for, specified purposes. This bill would require the Director of Finance to make written determinations, as specified, of whether any moneys derived from that fee are being allocated for any purpose other than the specified purpose, and to immediately submit his or her written determination to the Director of the Department of Motor Vehicles and specified legislative committees, as provided.

The bill would further provide that if the Director of Finance determines that moneys are being allocated by the state for an unauthorized purpose,

the Director of the Department of Motor Vehicles shall, upon receipt of the written determination, immediately stop collection of the fee, and shall resume collection only upon his or her receipt of a written determination by the Director of Finance that none of the moneys are being allocated for an unauthorized purpose.

Existing law imposes a state sales and use tax on retailers and on the storage, use, or other consumption of tangible personal property in this state at the rate of 6¼% of the gross receipts from the retail sale of tangible personal property in this state and of the sales price of tangible personal property purchased from any retailer for storage, use, or other consumption in this state.

This bill would increase the state sales and use tax rate on the sale of, and on the storage, use, or other consumption of, tangible personal property, by 1% to a rate of 7¼% from April 1, 2009, until July 1, 2012.

This bill would reduce the operative periods for the increases proposed by this bill in specified income, sales and use, and vehicle license fees, if specified conditions occur.

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on December 19, 2008.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on December 19, 2008, pursuant to the California Constitution.

This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 99040 is added to the Government Code, to read:

99040. The Director of Finance shall immediately notify the Joint Legislative Budget Committee, the Executive Officer of the Franchise Tax Board, the Executive Director of the State Board of Equalization, and the Director of the Department of Motor Vehicles when and if an amendment to the California Constitution is approved at a statewide election held during the 2009 calendar year, that limits the total amount that, under Section 20 of Article XVI of the California Constitution, may be transferred by statute from the Budget Stabilization Account, or any successor to that account, to the General Fund.

SEC. 2. Section 6051.7 is added to the Revenue and Taxation Code, to read:

6051.7. (a) In addition to the taxes imposed by Section 6051 and any other provision of this part, for the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers at the rate of 1

percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state, on and after April 1, 2009.

(b) This section shall cease to be operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this section shall cease to be operative on July 1, 2012.

SEC. 3. Section 6201.7 is added to the Revenue and Taxation Code, to read:

6201.7. (a) In addition to the taxes imposed by Section 6201 and any other provision of this part, an excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state, at the rate of 1 percent of the sales price of the property, on and after April 1, 2009.

(b) This section shall cease to be operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this section shall cease to be operative on July 1, 2012.

SEC. 4. Section 10752 of the Revenue and Taxation Code is amended to read:

10752. (a) The annual amount of the license fee for any vehicle, other than a trailer or semitrailer, as described in subdivision (a) of Section 5014.1 of the Vehicle Code or a commercial motor vehicle described in Section 9400.1 of the Vehicle Code, or a trailer coach that is required to be moved under permit as authorized in Section 35790 of the Vehicle Code, shall be a sum equal to the following percentage of the market value of the vehicle as determined by the department:

(1) Sixty-five hundredths of 1 percent on and after January 1, 2005, and before May 19, 2009.

(2) One percent on and after May 19, 2009.

(b) The annual amount of the license fee for any commercial vehicle as described in Section 9400.1 of the Vehicle Code, shall be a sum equal to 0.65 percent of the market value of the vehicle as determined by the department.

(c) Notwithstanding Chapter 5 (commencing with Section 11001) or any other law to the contrary, all revenues (including penalties), less refunds, attributable to that portion of the rate imposed pursuant to this section in excess of 0.65 percent shall be deposited into the General Fund.

(d) This section shall cease to be operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case the section shall cease to be operative on July 1, 2013.

SEC. 5. Section 10752 is added to the Revenue and Taxation Code, to read:

10752. (a) The annual amount of the license fee for any vehicle, other than a trailer or semitrailer, as described in subdivision (a) of Section 5014.1 of the Vehicle Code, or a trailer coach that is required to be moved under

permit as authorized in Section 35790 of the Vehicle Code, shall be a sum equal to 0.65 percent of the market value of the vehicle as determined by the department.

(b) This section shall become operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this section shall become operative on July 1, 2013.

SEC. 6. Section 10752.1 of the Revenue and Taxation Code is amended to read:

10752.1. (a) The annual amount of the license fee for a trailer coach which is required to be moved under permit as authorized in Section 35790 of the Vehicle Code shall be a sum equal to the following percentage of the market value of the vehicle as determined by the department:

(1) Sixty-five hundredths of 1 percent on and after January 1, 2005, and before May 19, 2009.

(2) One percent on and after May 19, 2009.

(b) Notwithstanding Chapter 5 (commencing with Section 11001) or any other law to the contrary, all revenues (including penalties), less refunds, attributable to that portion of the rate imposed pursuant to this section in excess of 0.65 percent shall be deposited in the General Fund.

(c) This section shall cease to be operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this section shall cease to be operative on July 1, 2013.

SEC. 7. Section 10752.1 is added to the Revenue and Taxation Code, to read:

10752.1. (a) The annual amount of the license fee for a trailer coach which is required to be moved under permit as authorized in Section 35790 of the Vehicle Code shall be a sum equal to 0.65 percent of the market value of the vehicle as determined by the department.

(b) This section shall become operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this section shall become operative on July 1, 2013.

SEC. 8. Section 10752.2 is added to the Revenue and Taxation Code, to read:

10752.2. (a) On and after May 19, 2009, in addition to the annual license fee for a vehicle, other than a commercial motor vehicle described in Section 9400.1 of the Vehicle Code, imposed pursuant to Sections 10752 and 10752.1, a sum equal to 0.15 percent of the market value of the vehicle as determined by the department, shall be added to that annual fee.

(b) Notwithstanding Chapter 5 (commencing with Section 11001) or any other law to the contrary, all revenues (including penalties), less refunds, derived from fees collected pursuant to subdivision (a) shall be deposited in the General Fund and transferred to the Local Safety and Protection Account, which is hereby established in the Transportation Tax Fund. Notwithstanding Section 13340 of the Government Code, all moneys in the

account are hereby continuously appropriated, without regard to fiscal year, to the Controller for allocation pursuant to Sections 29553, 30061, and 30070 of the Government Code, Section 13821 of the Penal Code, and Sections 18220 and 18220.1 of the Welfare and Institutions Code.

(c) (1) In 2010 and each calendar year thereafter, the Director of Finance shall, no later than January 10 and upon the enactment of the Budget Act during the calendar year, make a written determination of whether any of the moneys derived from fees collected pursuant to subdivision (a) are being allocated by the state for any purpose not authorized by subdivision (b), and shall immediately submit his or her written determination to all of the following:

(A) The Director of the Department of Motor Vehicles.

(B) The Joint Legislative Budget Committee.

(C) The Senate and Assembly Appropriations Committees.

(D) The Senate and Assembly Revenue and Taxation Committees.

(2) If the Director of Finance determines that any moneys derived from fees collected pursuant to subdivision (a) are being allocated by the state for a purpose not authorized by subdivision (b), the Director of the Department of Motor Vehicles shall, upon receipt of the written determination, immediately cease collection of the fees imposed by subdivision (a), and shall resume collection of those fees only upon his or her receipt of written determination provided under paragraph (1) that specifies that none of the moneys derived from fees collected pursuant to subdivision (a) are being allocated by the state for a purpose not authorized by subdivision (a).

(d) This section shall cease to be operative on July 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this section shall cease to be operative on July 1, 2013.

SEC. 9. Section 17041 of the Revenue and Taxation Code is amended to read:

17041. (a) (1) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state who is not a part-year resident, except the head of a household as defined in Section 17042, taxes in the following amounts and at the following rates upon the amount of taxable income computed for the taxable year as if the resident were a resident of this state for the entire taxable year and for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions:

If the taxable income is:	The tax is:
Not over $3,650	1% of the taxable income
Over $3,650 but not over $8,650	$36.50 plus 2% of the excess over $3,650

Over $8,650 but not over $13,650	$136.50 plus 4% of the excess over $8,650
Over $13,650 but not over $18,950	$336.50 plus 6% of the excess over $13,650
Over $18,950 but not over $23,950	$654.50 plus 8% of the excess over $18,950
Over $23,950	$1,054.50 plus 9.3% of the excess over $23,950

(2) (A) For taxable years beginning on or after January 1, 2009, and before January 1, 2011, or January 1, 2013, as applicable, the percentages specified in the table in paragraph (1) shall be increased by adding 0.25 percent to each percentage. This subparagraph shall become operative only if the Director of Finance does not provide notification to the Joint Legislative Budget Committee on or before April 1, 2009, pursuant to Section 99030 of the Government Code. This subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2013.

(B) For taxable years beginning on or after January 1, 2009, and before January 1, 2011, or January 1, 2013, as applicable, the percentages specified in the table in paragraph (1) shall be increased by adding 0.125 percent to each percentage. This subparagraph shall become operative only if the Director of Finance provides notification to the Joint Legislative Budget Committee on or before April 1, 2009, pursuant to Section 99030 of the Government Code. This subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2013.

(b) (1) There shall be imposed for each taxable year upon the taxable income of every nonresident or part-year resident, except the head of a household as defined in Section 17042, a tax as calculated in paragraph (2).

(2) The tax imposed under paragraph (1) shall be calculated by multiplying the "taxable income of a nonresident or part-year resident," as defined in subdivision (i), by a rate (expressed as a percentage) equal to the tax computed under subdivision (a) on the entire taxable income of the nonresident or part-year resident as if the nonresident or part-year resident were a resident of this state for the taxable year and as if the nonresident or part-year resident were a resident of this state for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions, divided by the amount of that income.

(c) (1) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state who is not a part-year resident for that taxable year, when the resident is the head of a household, as defined in Section 17042, taxes in the following amounts and at the following rates upon the amount of taxable income computed for the taxable year as if the resident were a resident of the state for the entire taxable year and for all prior taxable years for carryover items, deferred income, suspended losses, or suspended deductions:

If the taxable income is:	The tax is:
Not over $7,300	1% of the taxable income
Over $7,300 but not over $17,300	$73 plus 2% of the excess over $7,300
Over $17,300 but not over $22,300	$273 plus 4% of the excess over $17,300
Over $22,300 but not over $27,600	$473 plus 6% of the excess over $22,300
Over $27,600 but not over $32,600	$791 plus 8% of the excess over $27,600
Over $32,600	$1,191 plus 9.3% of the excess over $32,600

(2) (A) For taxable years beginning on or after January 1, 2009, and before January 1, 2011, or January 1, 2013, as applicable, the percentages specified in the table in paragraph (1) shall be increased by adding 0.25 percent to each percentage. This subparagraph shall become operative only if the Director of Finance does not provide notification to the Joint Legislative Budget Committee on or before April 1, 2009, pursuant to Section 99030 of the Government Code. This subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2013.

(B) For taxable years beginning on or after January 1, 2009, and before January 1, 2011, or January 1, 2013, as applicable, the percentages specified in the table in paragraph (1) shall be increased by adding 0.125 percent to each percentage. This subparagraph shall become operative only if the Director of Finance provides notification to the Joint Legislative Budget Committee on or before April 1, 2009, pursuant to Section 99030 of the Government Code. This subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code,

in which case this subparagraph shall cease to be operative for taxable years beginning on or after January 1, 2013.

(d) (1) There shall be imposed for each taxable year upon the taxable income of every nonresident or part-year resident when the nonresident or part-year resident is the head of a household, as defined in Section 17042, a tax as calculated in paragraph (2).

(2) The tax imposed under paragraph (1) shall be calculated by multiplying the "taxable income of a nonresident or part-year resident," as defined in subdivision (i), by a rate (expressed as a percentage) equal to the tax computed under subdivision (c) on the entire taxable income of the nonresident or part-year resident as if the nonresident or part-year resident were a resident of this state for the taxable year and as if the nonresident or part-year resident were a resident of this state for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions, divided by the amount of that income.

(e) There shall be imposed for each taxable year upon the taxable income of every estate, trust, or common trust fund taxes equal to the amount computed under subdivision (a) for an individual having the same amount of taxable income.

(f) The tax imposed by this part is not a surtax.

(g) (1) Section 1(g) of the Internal Revenue Code, relating to certain unearned income of minor children taxed as if the parent's income, shall apply, except as otherwise provided.

(2) Section 1(g)(7)(B)(ii)(II) of the Internal Revenue Code, relating to income included on parent's return, is modified, for purposes of this part, by substituting "1 percent" for "15 percent."

(h) For each taxable year beginning on or after January 1, 1988, the Franchise Tax Board shall recompute the income tax brackets prescribed in subdivisions (a) and (c). That computation shall be made as follows:

(1) The California Department of Industrial Relations shall transmit annually to the Franchise Tax Board the percentage change in the California Consumer Price Index for all items from June of the prior calendar year to June of the current calendar year, no later than August 1 of the current calendar year.

(2) The Franchise Tax Board shall do both of the following:

(A) Compute an inflation adjustment factor by adding 100 percent to the percentage change figure that is furnished pursuant to paragraph (1) and dividing the result by 100.

(B) Multiply the preceding taxable year income tax brackets by the inflation adjustment factor determined in subparagraph (A) and round off the resulting products to the nearest one dollar ($1).

(i) (1) For purposes of this part, the term "taxable income of a nonresident or part-year resident" includes each of the following:

(A) For any part of the taxable year during which the taxpayer was a resident of this state (as defined by Section 17014), all items of gross income and all deductions, regardless of source.

(B) For any part of the taxable year during which the taxpayer was not a resident of this state, gross income and deductions derived from sources within this state, determined in accordance with Article 9 of Chapter 3 (commencing with Section 17301) and Chapter 11 (commencing with Section 17951).

(2) For purposes of computing "taxable income of a nonresident or part-year resident" under paragraph (1), the amount of any net operating loss sustained in any taxable year during any part of which the taxpayer was not a resident of this state shall be limited to the sum of the following:

(A) The amount of the loss attributable to the part of the taxable year in which the taxpayer was a resident.

(B) The amount of the loss which, during the part of the taxable year the taxpayer is not a resident, is attributable to California source income and deductions allowable in arriving at taxable income of a nonresident or part-year resident.

(3) For purposes of computing "taxable income of a nonresident or part-year resident" under paragraph (1), any carryover items, deferred income, suspended losses, or suspended deductions shall only be includable or allowable to the extent that the carryover item, deferred income, suspended loss, or suspended deduction was derived from sources within this state, calculated as if the nonresident or part-year resident, for the portion of the year he or she was a nonresident, had been a nonresident for all prior years.

SEC. 10. Section 17054 of the Revenue and Taxation Code is amended to read:

17054. In the case of individuals, the following credits for personal exemption may be deducted from the tax imposed under Section 17041 or 17048, less any increases imposed under paragraph (1) of subdivision (d) or paragraph (1) of subdivision (e), or both, of Section 17560.

(a) In the case of a single individual, a head of household, or a married individual making a separate return, a credit of fifty-two dollars ($52).

(b) In the case of a surviving spouse (as defined in Section 17046), or a husband and wife making a joint return, a credit of one hundred four dollars ($104). If one spouse was a resident for the entire taxable year and the other spouse was a nonresident for all or any portion of the taxable year, the personal exemption shall be divided equally.

(c) In addition to any other credit provided in this section, in the case of an individual who is 65 years of age or over by the end of the taxable year, a credit of fifty-two dollars ($52).

(d) (1) A credit of two hundred twenty-seven dollars ($227) for each dependent (as defined in Section 17056) for whom an exemption is allowable under Section 151(c) of the Internal Revenue Code, relating to additional exemption for dependents. The credit allowed under this subdivision for taxable years beginning on or after January 1, 1999, shall not be adjusted pursuant to subdivision (i) for any taxable year beginning before January 1, 2000.

(2) The credit allowed under paragraph (1) may not be denied on the basis that the identification number of the dependent, as defined in Section

17056, for whom an exemption is allowable under Section 151(c) of the Internal Revenue Code, relating to additional exemption for dependents, is not included on the return claiming the credit.

(3) (A) For taxable years beginning on or after January 1, 2009, the credit allowed under paragraph (1) for each dependent shall be equal to the credit allowed under subdivision (a). This subparagraph shall cease to be operative on January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this subparagraph shall cease to be operative on January 1, 2013.

(B) Commencing on the date that subparagraph (A) ceases to be operative, the credit allowed under paragraph (1) for each dependent shall be equal to the amount that would be allowed if subparagraph (A) had never been operative.

(e) A credit for personal exemption of fifty-two dollars ($52) for the taxpayer if he or she is blind at the end of his or her taxable year.

(f) A credit for personal exemption of fifty-two dollars ($52) for the spouse of the taxpayer if a separate return is made by the taxpayer, and if the spouse is blind and, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer.

(g) For the purposes of this section, an individual is blind only if either (1) his or her central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or (2) his or her visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

(h) In the case of an individual with respect to whom a credit under this section is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, the credit amount applicable to that individual for that individual's taxable year is zero.

(i) For each taxable year beginning on or after January 1, 1989, the Franchise Tax Board shall compute the credits prescribed in this section. That computation shall be made as follows:

(1) The California Department of Industrial Relations shall transmit annually to the Franchise Tax Board the percentage change in the California Consumer Price Index for all items from June of the prior calendar year to June of the current calendar year, no later than August 1 of the current calendar year.

(2) The Franchise Tax Board shall add 100 percent to the percentage change figure which is furnished to them pursuant to paragraph (1), and divide the result by 100.

(3) The Franchise Tax Board shall multiply the immediately preceding taxable year credits by the inflation adjustment factor determined in paragraph (2), and round off the resulting products to the nearest one dollar ($1).

(4) In computing the credits pursuant to this subdivision, the credit provided in subdivision (b) shall be twice the credit provided in subdivision (a).

SEC. 11. Section 17062 of the Revenue and Taxation Code is amended to read:

17062. (a) In addition to the other taxes imposed by this part, there is hereby imposed for each taxable year, a tax equal to the excess, if any, of—

(1) The tentative minimum tax for the taxable year, over

(2) The regular tax for the taxable year.

(b) For purposes of this chapter, each of the following shall apply:

(1) The tentative minimum tax shall be computed in accordance with Sections 55 to 59, inclusive, of the Internal Revenue Code, except as otherwise provided in this part.

(2) The regular tax shall be the amount of tax imposed by Section 17041 or 17048, before reduction for any credits against the tax, less any amount imposed under paragraph (1) of subdivision (d) and paragraph (1) of subdivision (e) of Section 17560.

(3) (A) The provisions of Section 55(b)(1) of the Internal Revenue Code shall be modified to provide that the tentative minimum tax for the taxable year shall be equal to the following percent of so much of the alternative minimum taxable income for the taxable year as exceeds the exemption amount, before reduction for any credits against the tax:

(i) For any taxable year beginning on or after January 1, 1991, and before January 1, 1996, 8.5 percent.

(ii) For any taxable year beginning on or after January 1, 1996, and before January 1, 2009, 7 percent.

(iii) For taxable years beginning on and after January 1, 2009, and before January 1, 2011, or January 1, 2013, as applicable, 7.25 percent. This clause shall become operative only if the Director of Finance does not provide notification to the Joint Legislative Budget Committee on or before April 1, 2009, pursuant to Section 99030 of the Government Code. This clause shall cease to be operative for taxable years beginning on or after January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this clause shall cease to be operative for taxable years beginning on or after January 1, 2013.

(iv) For taxable years beginning on and after January 1, 2009, and before January 1, 2011, or January 1, 2013, as applicable, 7.125 percent. This clause shall become operative only if the Director of Finance provides notification to the Joint Legislative Budget Committee on or before April 1, 2009, pursuant to Section 99030 of the Government Code. This clause shall cease to be operative for taxable years beginning on or after January 1, 2011, unless the Director of Finance makes the notification pursuant to Section 99040 of the Government Code, in which case this clause shall cease to be operative for taxable years beginning on or after January 1, 2013.

(v) For any taxable year beginning on or after January 1, 2011, or January 1, 2013, as applicable, for which clause (iii) or (iv) ceases to be operative, 7 percent.

(B) In the case of a nonresident or part-year resident, the tentative minimum tax shall be computed by multiplying the alternative minimum taxable income of the nonresident or part-year resident, as defined in

subparagraph (C), by a rate (expressed as a percentage) equal to the tax computed under subdivision (b) on the alternative minimum taxable income of the nonresident or part-year resident as if the nonresident or part-year resident were a resident of this state for the taxable year and as if the nonresident or part-year resident were a resident of this state for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions, divided by the amount of that income.

(C) For purposes of this section, the term "alternative minimum taxable income of a nonresident or part-year resident" includes each of the following:

(i) For any period during which the taxpayer was a resident of this state (as defined by Section 17014), all items of alternative minimum taxable income (as modified for purposes of this chapter), regardless of source.

(ii) For any period during which the taxpayer was not a resident of this state, alternative minimum taxable income (as modified for purposes of this chapter) which were derived from sources within this state, determined in accordance with Article 9 of Chapter 3 (commencing with Section 17301) and Chapter 11 (commencing with Section 17951).

(iii) For purposes of computing "alternative minimum taxable income of a nonresident or part-year resident," any carryover items, deferred income, suspended losses, or suspended deductions shall only be allowable to the extent that the carryover item, suspended loss, or suspended deduction was derived from sources within this state.

(4) The provisions of Section 55(b)(2) of the Internal Revenue Code, relating to alternative minimum taxable income, shall be modified to provide that alternative minimum taxable income shall not include the income, adjustments, and items of tax preference attributable to any trade or business of a qualified taxpayer.

(A) For purposes of this paragraph, "qualified taxpayer" means a taxpayer who meets both of the following:

(i) Is the owner of, or has an ownership interest in, a trade or business.

(ii) Has aggregate gross receipts, less returns and allowances, of less than one million dollars ($1,000,000) during the taxable year from all trades or businesses of which the taxpayer is the owner or has an ownership interest, in the amount of that taxpayer's proportionate interest in each trade or business.

(B) For purposes of this paragraph, "aggregate gross receipts, less returns and allowances" means the sum of the gross receipts of the trades or businesses that the taxpayer owns and the proportionate interest of the gross receipts of the trades or businesses that the taxpayer owns and of pass-through entities in which the taxpayer holds an interest.

(C) For purposes of this paragraph, "gross receipts, less returns and allowances" means the sum of the gross receipts from the production of business income, as defined in subdivision (a) of Section 25120, and the gross receipts from the production of nonbusiness income, as defined in subdivision (d) of Section 25120.

(D) For purposes of this paragraph, "proportionate interest" means:

(i) In the case of a pass-through entity that reports a profit for the taxable year, the taxpayer's profit interest in the entity at the end of the taxpayer's taxable year.

(ii) In the case of a pass-through entity that reports a loss for the taxable year, the taxpayer's loss interest in the entity at the end of the taxpayer's taxable year.

(iii) In the case of a pass-through entity that is sold or liquidates during the taxable year, the taxpayer's capital account interest in the entity at the time of the sale or liquidation.

(E) (i) For purposes of this paragraph, "proportionate interest" includes an interest in a pass-through entity.

(ii) For purposes of this paragraph, "pass-through entity" means any of the following:

(I) A partnership, as defined by Section 17008.

(II) An "S corporation," as provided in Chapter 4.5 (commencing with Section 23800) of Part 11.

(III) A regulated investment company, as provided in Section 24871.

(IV) A real estate investment trust, as provided in Section 24872.

(V) A real estate mortgage investment conduit, as provided in Section 24874.

(5) For taxable years beginning on or after January 1, 1998, Section 55(d)(1) of the Internal Revenue Code, relating to exemption amount for taxpayers other than corporations is modified, for purposes of this part, to provide the following exemption amounts in lieu of those contained therein:

(A) Fifty-seven thousand two hundred sixty dollars ($57,260) in the case of either of the following:

(i) A joint return.

(ii) A surviving spouse.

(B) Forty-two thousand nine hundred forty-five dollars ($42,945) in the case of an individual who is both of the following:

(i) Not a married individual.

(ii) Not a surviving spouse.

(C) Twenty-eight thousand six hundred thirty dollars ($28,630) in the case of either of the following:

(i) A married individual who files a separate return.

(ii) An estate or trust.

(6) For taxable years beginning on or after January 1, 1998, Section 55(d)(3) of the Internal Revenue Code, relating to the phaseout of exemption amount for taxpayers other than corporations is modified, for purposes of this part, to provide the following phaseout of exemption amounts in lieu of those contained therein:

(A) Two hundred fourteen thousand seven hundred twenty-five dollars ($214,725) in the case of a taxpayer described in subparagraph (A) of paragraph (5).

(B) One hundred sixty-one thousand forty-four dollars ($161,044) in the case of a taxpayer described in subparagraph (B) of paragraph (5).

(C) One hundred seven thousand three hundred sixty-two dollars ($107,362) in the case of a taxpayer described in subparagraph (C) of paragraph (5).

(7) For each taxable year beginning on or after January 1, 1999, the Franchise Tax Board shall recompute the exemption amounts prescribed in paragraph (5) and the phaseout of exemption amounts prescribed in paragraph (6). Those computations shall be made as follows:

(A) The California Department of Industrial Relations shall transmit annually to the Franchise Tax Board the percentage change in the California Consumer Price Index for all items from June of the prior calendar year to June of the current calendar year, no later than August 1 of the current calendar year.

(B) The Franchise Tax Board shall do both of the following:

(i) Compute an inflation adjustment factor by adding 100 percent to the percentage change figure that is furnished pursuant to subparagraph (A) and dividing the result by 100.

(ii) Multiply the preceding taxable year exemption amounts and the phaseout of exemption amounts by the inflation adjustment factor determined in clause (i) and round off the resulting products to the nearest one dollar ($1).

(c) (1) (A) Section 56(a)(6) of the Internal Revenue Code as in effect on January 1, 1997, relating to installment sales of certain property, shall not apply to payments received in taxable years beginning on or after January 1, 1997, with respect to dispositions occurring in taxable years beginning after December 31, 1987.

(B) This paragraph shall not apply to taxable years beginning on or after January 1, 1998.

(2) Section 56(b)(1)(E) of the Internal Revenue Code, relating to standard deduction and deduction for personal exemptions not allowed, is modified, for purposes of this part, to deny the standard deduction allowed by Section 17073.5.

(3) Section 56(b)(3) of the Internal Revenue Code, relating to treatment of incentive stock options, shall be modified to additionally provide the following:

(A) Section 421 of the Internal Revenue Code shall not apply to the transfer of stock acquired pursuant to the exercise of a California qualified stock option under Section 17502.

(B) Section 422(c)(2) of the Internal Revenue Code shall apply in any case where the disposition and inclusion of a California qualified stock option for purposes of this chapter are within the same taxable year and that section shall not apply in any other case.

(C) The adjusted basis of any stock acquired by the exercise of a California qualified stock option shall be determined on the basis of the treatment prescribed by this paragraph.

(d) The provisions of Section 57(a)(5) of the Internal Revenue Code, relating to tax-exempt interest shall not apply.

(e) Section 57(a) of the Internal Revenue Code, relating to items of tax preference, is modified to include as an item of tax preference an amount equal to one-half of the amount excluded from gross income for the taxable year under Section 18152.5.

(f) The provisions of Section 59(a) of the Internal Revenue Code, relating to the alternative minimum tax foreign tax credit, shall not apply.

SEC. 12. This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 13. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to properly address the current fiscal emergency, it is necessary that this act go into immediate effect.

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AMENDED IN ASSEMBLY MAY 26, 2009

AMENDED IN ASSEMBLY MAY 5, 2009

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL No. 1523

Introduced by Assembly Member Charles Calderon

February 27, 2009

An act to add Sections 6376.3 and 6376.4 to the Revenue and Taxation Code, relating to taxation, to take effect immediately, tax levy.

LEGISLATIVE COUNSEL'S DIGEST

AB 1523, as amended, Charles Calderon. Sales and use taxes: exemption: fixed price contract.

Existing law imposes a state sales and use tax on retailers and on the storage, use, or other consumption of tangible personal property in this state at the *combined* rate of ~~6¼%~~ *7¼%* of the gross receipts from the retail sale of tangible personal property in this state and of the sales price of tangible personal property purchased from any retailer for storage, use, or other consumption in this state.

This bill would, during the period of *the imposition of* a 1% sales and use tax increase ~~above the rate of 6¼%~~ *commencing on April 1, 2009*, exclude from that 1% rate of tax, the gross receipts from certain sales and uses of tangible personal property that are subject to a fixed price pursuant to a contract entered into prior to ~~the operative date of the sales and use tax increase~~ *April 1, 2009*.

This bill would also, for any increase in the sales and use tax rate on and after January 1, 2010, exclude from that increased rate of tax, the gross receipts from certain sales and uses of tangible personal property

that are subject to a fixed price pursuant to a contract entered into prior to the operative date of the sales and use tax *rate* increase.

This bill would make certain legislative findings and declarations that a fixed price contract exemption serves a statewide public purpose.

This bill would take effect immediately as a tax levy.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 6376.3 is added to the Revenue and Taxation Code, to read:

6376.3. From ~~the operative date of the act adding Sections 6051.7 and 6201.7~~ *April 1, 2009*, to the date on which the taxes imposed by Sections 6051.7 and 6201.7 cease to be operative, there is exempted from the taxes imposed by this part an amount equal to an amount that is attributable to a 1 percent rate of tax with respect to the following:

(a) The gross receipts from the sale of, and the storage, use, or other consumption in this state of, the following:

(1) Tangible personal property, if the seller is obligated to furnish or the purchaser is obligated to purchase the property for a fixed price pursuant to a contract entered into prior to the operative date of the act adding Sections 6051.7 and 6201.7.

(2) Materials and fixtures obligated pursuant to an engineering construction contract or a building construction contract entered into for a fixed price prior to the operative date of the act adding Sections 6051.7 and 6201.7.

For purposes of this subdivision, tangible personal property shall not be deemed obligated pursuant to a contract for any period of time for which any party to the contract has the right to terminate the contract upon notice, whether or not the right is exercised.

(b) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to the operative date of the act adding Sections 6051.7 and 6201.7. For purposes of this subdivision, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to

terminate the contract or lease upon notice, whether or not that right is exercised.

(c) The possession of, or the exercise of, any right or power over tangible personal property pursuant to a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to the operative date of the act adding Sections 6051.7 and 6201.7. For purposes of this subdivision, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

SEC. 2. Section 6376.4 is added to the Revenue and Taxation Code, to read:

6376.4. On and after January 1, 2010, from the operative date of an act that increases the sales and use tax rate, to the date on which the taxes imposed by that act ~~ceases~~ *cease* to be operative, there ~~are~~ *is* exempted from the taxes imposed by this part an amount equal to an amount that is attributable to the rate of tax imposed with respect to the following:

(a) The gross receipts from the sale of, and the storage, use, or other consumption in this state of, the following:

(1) Tangible personal property, if the seller is obligated to furnish or the purchaser is obligated to purchase the property for a fixed price pursuant to a contract entered into prior to ~~July 1, 1993~~ *the operative date of the act that increased the sales and use tax rate.*

(2) Materials and fixtures obligated pursuant to an engineering construction contract or a building construction contract entered into for a fixed price prior to the operative date of the act that increased the sales and use tax rate.

For purposes of this subdivision, tangible personal property shall not be deemed obligated pursuant to a contract for any period of time for which any party to the contract has the right to terminate the contract upon notice, whether or not the right is exercised.

(b) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease

prior to the operative date of the act that increased the sales and use tax rate. For purposes of this subdivision, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(c) The possession of, or the exercise of, any right or power over tangible personal property pursuant to a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to the operative date of the act that increased the sales and use tax rate. For purposes of this subdivision, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

SEC. 3. The Legislature finds and declares that Section 1 of this act fulfills a statewide public purpose because of the following:

This act provides necessary relief to the retailers or contractors who entered into a fixed price contract or a fixed price lease agreement prior to the operative date of the 1 percent sales and use tax increase above the rate of 6.25 percent. A fixed price contract exemption would protect the business expectations of parties who enter into fixed price contracts and protect them from an unplanned increase in the tax rate.

SEC. 4. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect.

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CURRENT BILL STATUS

MEASURE : A.B. No. 1523
AUTHOR(S) : Charles Calderon.
TOPIC : Sales and use taxes: exemption: fixed price contract.
HOUSE LOCATION : ASM
+LAST AMENDED DATE : 05/26/2009

TYPE OF BILL :
Active
Non-Urgency
Non-Appropriations
Majority Vote Required
Non-State-Mandated Local Program
Fiscal
Tax Levy

LAST HIST. ACT. DATE: 05/28/2009
LAST HIST. ACTION : In committee: Set, first hearing. Referred to APPR. suspense file. Held under submission.
COMM. LOCATION : ASM APPROPRIATIONS

TITLE : An act to add Sections 6376.3 and 6376.4 to the Revenue and Taxation Code, relating to taxation, to take effect immediately, tax levy.

THE CALIFORNIA CONSTRUCTION INDUSTRY

March 19, 2009

Honorable Charles Calderon, Chair
Assembly Committee on Revenue and Taxation
Room 2117 , State Capitol
Sacramento, California 95814

Dear Assemblyman Calderon:

The California Construction Industry, represented by the organizations signing below, are all co-sponsors and in support of AB 1523 (Calderon) relating to the 1% state sales tax increase that will take effect on April 1 of this year as enacted by AB 3xxx (Evans).

AB 1523 will provide that during the period of the sales tax increase, materials and supplies purchased or obligated by a fixed price contract entered into prior to the sales tax increase, are exempt from paying the additional tax.

When the Legislature has increased the sales tax previously, provisions have been included in the legislation exempting fixed price contracts from the rate increase. The last state sales tax increase was in 1991, enacted by AB 2181 and SB 79 and contained the language proposed by AB 1523. A similar sales tax increase in 1989 in response to the Loma Prieta earthquake also contained the exemption language in SB 33x in 1989. Local sales tax enactments already have fixed price contract exemptions in Revenue and Taxation Code Sections 7261(g) and 7262(f) that are permanent provisions and are administered by the Board of Equalization.

Construction contracts are normally entered into on a fixed price basis, with the contractor assuming the risk and responsibility for costs under the control of the contractor. The fixed price contract exemption protects the contractor who entered into a fixed price contract based on the sales tax impact at the time on the contract. If the contractor had knowledge of the change in tax rate at the time of bid or contract, the contractor would have factored the tax increase into the contract price. Without AB 1523, contractors holding existing fixed price contracts would be forced unfairly to absorb the tax increase.

Based on the precedence of previous sales tax legislation at both the state and local level, the following construction organizations are please to co-sponsor and support AB 1523.

Associated General Contractors
Engineering and Utility Contractors Association
Southern California Contractors Association
Engineering Contractors Association

Construction Employers Association
California Association of Sheet Metal and Air Conditioning Contractors National Association
Concrete Contractors Association, Inc.
California Nevada Cement Association
The California Chapters of the National Electrical Contractors Association
The California Legislative Conference of the Plumbing, Heating and Piping Industry
Golden State Builders Exchanges
California Landscape Contractors Association
Western Electrical Contractor Association (WECA-IEC)
California Fence Contractors' Association
Flasher/Barricade Association
California Chapter of the American Fence Contractors' Association
Pacific Rim Drywall Association

BusinessDictionary.com

fixed price contract

Definition

Contract that provides for a price which normally is not subject to any adjustment unless certain provisions (such as contract change, economic pricing, or defective pricing) are included in the agreement. These contracts are negotiated usually where reasonably definite specifications are available, and costs can be estimated with reasonable accuracy. A fixed price contract places minimum administrative burden on the contracting parties, but subjects the contractor to the maximum risk arising from full responsibility for all cost escalations. Also called firm price contract.

C

Court of Appeal, Second District, Division 3, California.
WESTERN CONTRACTING CORPORATION, Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION, Defendant and Respondent,
Department of Water Resources, Defendant and Appellant.
WESTERN CONTRACTING CORPORATION, Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION, Defendant and Respondent.
Civ. 42479.

May 22, 1974.

Contractor brought action against the Department of Water Resources and the State Board of Equalization for a declaration that certain materials and supplies used in the performance of contract for construction of dam were exempt from sales and use tax increase and the contractor brought action against the State Board of Equalization for refund of sales and use taxes paid by it. The cases were consolidated for trial. The Superior Court, Los Angeles County, Lester E. Olson, J., rendered judgment declaring that the materials, equipment and supplies were not exempt from sales or use taxes arising from the transactions, that the imposition of the increased tax was constitutional, that the Department's defense based upon the relief given by the contractor was insufficient and that the contractor was not entitled to be reimbursed for the increased tax burden and that the contractor was not entitled to a refund. The contractor appealed and the Department appealed from the portion of the judgment denying its defense based upon the relief. The Court of Appeal, Potter, J., held that statute which exempted from increase in sales and use taxes 'materials' and 'fixtures' in the sale, storage, use or other consumption of the material and fixtures which were obligated pursuant to an engineering construction project contract entered into for a fixed price prior to August 1, 1967, did not provide an exemption from the increase in sales and use taxes with respect to construction equipment and supplies utilized in performance of the contract. The Court further held that the contract did not provide for additional compensation to contractor equal to the increased tax burden borne by it and that there was no impairment of the obligation of the contractor if the exemption was not applicable and it received no additional compensation.

Judgment in No. 927 659 modified and, as modified affirmed; judgment in No. 986 775 affirmed.

West Headnotes

[1] Statutes 361 ⚷212.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.1 k. Knowledge of Legislature. Most Cited Cases
Where Board of Equalization ruling which defined "materials" and "fixtures" had been in effect and widely applied in the administration of the sales and use tax law for over 20 years at the time the legislature enacted statute which exempted from increase and sales and use taxes "materials" and "fixtures" for use in construction contracts made prior to the date of the sales tax increase, it would be presumed that the legislature used the terms "materials" and "fixtures" advisedly and in the sense which had been given them by the administrative ruling and a court decision upholding the ruling. West's Ann.Rev. & Tax.Code, § 6376.

[2] Taxation 371 ⚷3672

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(E) Rate and Amount of Tax
371k3672 k. In General. Most Cited Cases
(Formerly 371k1281)

Statute which exempted from increase in sales and use taxes "materials" and "fixtures" in the sale, storage, use or other consumption of the material and fixtures which were obligated pursuant to an engineering construction project contract entered into for a fixed price prior to August 1, 1967, did not provide an exemption from the increase in sales and use taxes with respect to construction equipment and supplies utilized in performance of contract with the Department of Water Resources to build dam. West's Ann.Rev. & Tax.Code, § 6376.

[3] **Taxation 371 ⚷3638**

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General
371k3638 k. In General. Most Cited Cases
(Formerly 371k1220)

Taxation 371 ⚷3639

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General
371k3639 k. Use Tax. Most Cited Cases
(Formerly 371k1220)
Statute which exempted from increase in sales and use taxes "materials" and "supplies" if such materials and supplies were obligated pursuant to an engineering construction project under contract entered into for fixed price prior to August 1, 1967, was a tax exemption provision which was to be narrowly construed. West's Ann.Rev. & Tax.Code, § 6376.

[4] **States 360 ⚷104**

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases
Where contract with Department of Water Resources to build dam provided that the contract price included full compensation for all taxes which the contractor is required to pay, whether imposed by federal, state, or local government, contract further provided that the contract price of the work would include full compensation for all costs incurred and the provisions of the contract relating to "changes in the contract" pertained only to those which affected the amount or quality of the work, contractor was not entitled to additional compensation on account of increased tax burden which resulted from increase in state sales and use taxes. West's Ann.Rev. & Tax.Code, § 6376.

[5] **States 360 ⚷104**

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases
Provision of contract with Department of Water Resources for dam construction which authorized engineer to order "such changes in the contract as are required for the proper completion of the work" and which permitted payment of additional compensation whenever changes cannot be fairly and reasonably paid for at contract prices did not permit contractor to recover additional compensation on account of increased sales and use tax burden where the change in the sales tax rate had nothing whatever to do with "proper completion of the work." West's Ann.Rev. & Tax.Code, § 6376.

[6] **Constitutional Law 92 ⚷2718**

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2717 Taxation
92k2718 k. In General. Most Cited Cases
(Formerly 92k137)
Where contractor received from the Department of Water Resources the full fixed price specified in the contract for construction of dam, increase in the sales

tax burden incident to performance did not constitute an impairment of the obligation of its contract. U.S.C.A.Const. art. 1, § 10; West's Ann.Const. art. 1, § 16.

[7] **Contracts 95 ⇐167**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k167 k. Existing Law as Part of Contract. Most Cited Cases

Both existing law and the reservation of the essential attributes of continuing governmental power are "read into" all contracts as a postulate of the legal order. U.S.C.A.Const. art. 1, § 10; Amend. 14; West's Ann.Const. art. 1, § 16.

[8] **Constitutional Law 92 ⇐2718**

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2717 Taxation
92k2718 k. In General. Most Cited Cases
(Formerly 92k137)

Taxation 371 ⇐3631

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3631 k. Rate and Amount of Tax. Most Cited Cases
(Formerly 371k1217)

Statute which grants exemption from increase in sales and use taxes for "materials" and "fixtures," if the sale, use or other consumption of the material and fixtures are obligated pursuant to an engineering construction contract entered into for fixed price prior to August 1, 1967, did not violate the impairment of contract clauses of the Federal and State Constitutions insofar as it caused an additional tax burden falling on contractor for sales and use taxes for supplies which did not lose identity and become an integral and inseparable part of the completed structure. West's Ann.Rev. & Tax.Code, § 6376; U.S.C.A.Const. art. 1, § 10; Amend. 14; West's Ann.Const. art. 1, § 16.

****229 *343** Don A. Ladenberger, Los Angeles and Lowell C. Kindig, Sioux City, Iowa, for plaintiffs and appellants Western Contracting Corp.

Evelle J. Younger, Atty. Gen., Ernest P. Goodman, Asst. Atty. Gen. and Neal J. Gobar, Deputy Atty. Gen., for defendant and respondent State Bd. of Equalization.

Evelle J. Younger, Atty. Gen., Carl Boronkay, Asst. Atty. Gen., Jane C. Goichman, Deputy Atty. Gen., for defendant and appellant Dept. of Water Resources.

POTTER, Associate Justice.

Western Contracting Corporation (Western), an Iowa corporation, was the successful low bidder and was awarded a lump sum fixed price contract with the State of California, Department of Water Resources, for the construction of the Castaic Dam in Los Angeles ***344** County. Subsequent thereto, effective August 1, 1967, our State Legislature increased the sales and use tax rate by 1 per cent, and also added section 6376 to the Revenue and Taxation Code [FN1] providing an exemption from the effect of such increase.

> FN1. All references hereafter will be to Revenue and Taxation Code sections unless otherwise indicated.

At all times material to this appeal, said section 6376 read as follows:

'There are exempted from 25 percent of the taxes imposed by this part the gross receipts from the sale of and the storage, use or other consumption in this state of material and fixtures, if the sale, storage, use or other consumption in this state of the material and fixtures ****230** are obligated pursuant to an engineering construction project contract or a building con-

struction contract entered into for a fixed price prior to August 1, 1967.

'For the purposes of this section, tangible personal property shall not be deemed obligated pursuant to a contract for any period of time for which any party to the contract has the right to terminate the contract upon notice, whether or not the right is exercised.'

Controversy as to the meaning of the exemption provided by section 6376 arose almost immediately. The Board vacillated between competing interpretations until it received in December 1967 an opinion of the Attorney General, whereupon it made a final ruling construing the exemption as applicable only to 'materials' and 'fixtures' as those terms had previously been defined in the Board's Ruling 11 (18 Cal.Adm.Code 1521), theretofore in effect for many years. As therein defined, 'materials' meant tangible personal property 'which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure' (for example, cement) and 'fixtures' meant 'things which are accessory to a building and which do not lose their identity as accessories when placed or installed' (for example, plumbing fixtures). This interpretation excluded from the exemption other tangible personal property used or consumed in the performance of the contract such as construction equipment and the spare parts, tires, fuel and accessories necessary to the operation thereof.

Western disagreed with the interpretation made by the Board insofar as it denied the exemption to the equipment and supplies. Faced with the prospect of an additional 1% Tax burden upon its expenditure of many millions of dollars for the rental or purchase of numerous items of heavy equipment (such as earth movers and cranes) and for tires, fuel, oil, grease and repair parts during the projected four years' performance ***345** under the contract, Western brought a declaratory relief action in March 1969 in the Los Angeles Superior Court (No. 927 659), naming the Department and the Board as defendants.[FN2]

> FN2. As originally filed, this suit named as plaintiffs two of Western's California suppliers. Their participation in the case requires no further mention, however, inasmuch as all appeals by any of them have been dismissed.

By its declaratory relief action, Western sought a determination: (1) that section 6376 provided an exemption from the increased sales tax rate with respect to the gross receipts from the sale or rental to it of the equipment used on the project, and the sale to it of the tires, fuel, lubricants, repair parts and other supplies consumed; (2) that in the event said exemption did not so apply, the contract between Western and the Department provided for additional compensation to Western equal to the burden of the increased tax which was passed on to Western by its vendors; and (3) if the exemption was not applicable and the contract did not provide for reimbursement, the additional 1 per cent levy constituted an impairment of its rights under the contract and the taking of property without due process of law.

Subsequent to the filing of the declaratory relief action, Western itself paid 'sales and use' taxes, the increased amount of which totalled approximately $102,000 and made a claim for refund which was rejected by the Board. It also sought administrative relief from the Department to increase its compensation under the contract. The Department ruled that the contract contained no provision for additional payment because of increased taxes.

After the Board denied the claim for refund, Western filed a second action against the Board (No. 986 775), seeking to recover the $102,000 it had paid in higher taxes. The actions were consolidated[FN3] ****231** for trial between Western, the Board and the Department. Consolidated findings of fact and conclusions of law were made, but separate judgments were entered. As between Western and the Board, the judgment in the declaratory relief action: (1) declared that section 6376 'does not exempt sales or use taxes arising from' the transactions in dispute, and (2) upheld the constitutionality of the imposition of the increased tax to such transactions. Between Western and the Department, said judgment: (1) held insufficient to Department's defense based upon a release given by Western and, on the merits, (2) declared that under the terms of its contract Western was not ***346** entitled to be reimbursed for the increased tax burdens incurred. The judgment in the refund action

against the Board was that Western 'take nothing.'

> FN3. Continental Leasing Corporation, a lessor of equipment to Western, brought a third action (No. 986 787), seeking refund of sales tax paid by it. This action, which was consolidated for trial with Western's two lawsuits, does not require further discussion inasmuch as Continental's appeal has been dismissed.

Western appealed from those portions of the declaratory judgment adverse to it and from the judgment against it on the refund claim. The Department filed an appeal from the portion of the judgment denying its defense based upon the release.

None of the appealing parties questions the findings of fact made by the trial court. The issues, therefore, relate to the propriety of the court's conclusions based thereon.

Issues

There are three issues which require determination on this appeal. They are:

1. Did section 6376, properly construed, provide an exemption from the increase in sales and use tax with respect to the construction equipment and supplies utilized in the performance of Western's contract?

2. Does the contract between Western and the Department provide for additional compensation to Western equal to the increased tax burden borne by it?

3. Is there an impairment of the obligation of Western's contract if the exemption is not applicable and it receives no additional compensation?

As will hereafter appear, other issues raised by the parties do not require resolution in view of the decision reached with respect to the above issues.

Interpretation of Section 6376

Section 6376 has never been interpreted in any decided case brought to the attention of this court. The evidence of its legislative history is limited, consisting solely of a statement by Senator Coombs in the course of proceedings before the State Board of Equalization on November 8, 1967, to the effect that as originally drafted, the words 'tangible personal property' appeared where the words 'material and fixtures' appear in the first paragraph of the section as enacted. The change was made 'during the course of the discussions of the Conference Committee' at the suggestions of a member of the staff of the Board. The Board argues that this history supports its interpretation of section 6376 because its staff member in recommending the use of the words 'material and fixtures' had clearly in mind the meaning ascribed to them in Ruling 11. Assuming this to be a fact, it is of little help in the interpretation of the statute unless such ***347** understanding was communicated to the members of the Legislature, and there is no evidence that it was.

A second argument advanced by the Board also lacks merit. The Board contends that the use and consumption of the construction equipment and supplies was not 'obligated' under the terms of the contract with the Department because the contract does not 'describe the types of tools or equipment which must be used.'However, section 6(g) of the contract generally requires the contractor 'to provide and use on the work only such construction equipment and plant as are capable of producing the quality and quantity of work and materials required by the contract within the time or times specified.'Consequently, though there may have been no specifications of the type described in section 6(h) of said contract 'providing that construction****232** equipment of a particular size or type is to be used,' it is obvious that large amounts of massive construction equipment consuming vast quantities of fuel and other supplies were necessarily involved in the performance of the contract.

[1] The more persuasive argument urged by the Board is based upon the fact that Ruling 11 had been in effect and widely applied in the administration of the Sales and Use Tax Law for over 20 years at the time section 6376 was enacted. The propriety of the classifications of tangible personal property set forth in Ruling 11, including 'materials' and 'fixtures,' had

been judicially recognized as early as 1952 in Gen. Elec. Co. v. State Bd. of Equalization, 111 Cal.App.2d 180, 244 P.2d 427. In view of these circumstances, it is 'reasonable to assume' that the Legislature used the terms 'advisedly and in the sense which had been given' them by the administrative ruling and the decision of the court. (City of Long Beach v. Payne, 3 Cal.2d 184, 191, 44 P.2d 305.)

It is, moreover, not necessary to refer to Ruling 11 to demonstrate that the change from 'tangible personal property' to 'material and fixtures' was intended to narrow the scope of the exemption. By no stretch of the imagination could construction equipment and supplies be considered 'fixtures,' and the meaning of 'material' is well understood in the construction trade. For example, section 1 of the 'Standard Provisions' of the contract between Western and the Department defines materials as 'Materials incorporated or to be incorporated in the work, unless otherwise clearly indicated,' as does Ruling 11.

[2] In response to the arguments of the Board, Western urges two points. First, it argues that retention of the words 'tangible personal property' in the second paragraph of section 6376 indicates an intention to establish an exemption applicable to all tangible personal property. This argument ***348** is not persuasive. The second paragraph merely limits the circumstances under which use or consumption shall be deemed 'obligated.' It does not purport to deal with the classification of property to which the exemption may apply.

Western's second argument is based upon Senate Resolution No. 13 presented to the Board at a meeting on November 8, 1967. This resolution, adopted in light of the Board's restrictive interpretation of section 6376 in its memorandum dated August 10, 1967, declared that the Senate 'did intend that such measure exempt from the application of the 1 percent sales tax increase all tangible personal property . . ..' The Board voted 3 to 2 in favor of a motion to 'comply with the request and comply with the intent of the Legislature-of the Senate-as they expressed it here in this Resolution . . ..' This determination was, however, never implemented and, after the Board had requested and received an opinion of the Attorney General dated December 7, 1967, supporting its original interpretation, the Board formally notified all contractors of the continued effectiveness of its original bulletin.

Western concedes that 'the Senate Resolution did not have the force and effect of law.'It urges, however, that it is a reliable indication of the intention with which section 6376 was enacted. We do not agree. Like any other act of the Legislature, section 6376 was a result of the joint action of the Senate and Assembly. If, as Western claims, the language employed in the statute was unsuited to such intent, the appropriate manner to correct the situation was an amendment adopted by both houses. This was, in fact, clearly recognized by the senators who presented the resolution to the Board; they represented that such an amendment, which they were confident would be passed, would be introduced within two months. But no such bill was introduced, and despite the Board's continued interpretation contrary to the claimed intent of the Legislature, section 6376 remained unchanged until the next increase in the sales and use tax rate was enacted ****233** in 1972. (Stats.1972, ch. 1406, s 19, p. 2971.)

Section 36 of said chapter 1406, the exemption provision applicable to the new increase, substituted the words 'material, fixtures and supplies' for the words 'material and fixtures' in section 6376.

The post-enactment history of section 6376, therefore, actually favors the Board's position more than it does Western's. The Legislature, with knowledge of the Board's interpretation, was content to let it stand from 1967 to 1972, which was as long as the exemption relating to the 1967 increase had any significance. When it enacted the next increase, a broader exemption was made applicable to it; however, even this exemption did not ***349** extend to 'all tangible personal property.' This is evidenced by the fact that after the change the Board issued its regulation 1521.5 construing the new provision; it defined 'materials' and 'fixtures' substantially as they were previously defined in Ruling 11 and defined 'supplies' as 'items of tangible personal property consumed in a one-time use directly in the performance of a construction contract,' (giving as examples fuel and dynamite), but specifically excluded 'tools and equipment, whether leased or purchased.'Subsequent to

this interpretation being placed upon it, section 36 of Statutes of 1972 was amended to clarify its applicability to both sales and use taxes but without in any respect modifying the description of personal property exempted. (Stats.1973, ch. 208, s 61.)

[3] Both the language and the legislative history, therefore, strongly support the interpretation urged by the Board. In addition, section 6376 is a tax exemption provision. As such, it is to be narrowly construed. (Santa Fe Transp. v. State Board of Equal., 51 Cal.2d 531, 539, 334 P.2d 907; Good Humor Co. v. State Board of Equal., 152 Cal.App.2d 873, 879, 313 P.2d 640.)The trial court's interpretation of it was therefore correct.

Additional Compensation Under the Contract

The trial court construed the construction contract as not providing for additional compensation on account of the increased tax burden. We agree.

[4] The contract provides generally that 'The contract price . . . of the work shall include full compensation for all costs incurred.'(s 9(b).) More specifically, with respect to the subject of taxes, section 4(h) states:

'Except as otherwise provided in the Special Provisions, the contract prices shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by federal, state, or local government, and no tax exemption certificate or any other document designed to exempt the Contractor from payment of tax will be furnished to the Contractor by the Department.'

To support its claim for extra compensation, Western relies upon the provisions of the contract relating to 'changes in the contract.' Section 7 of the contract deals with this subject matter. An examination of its provisions in this respect, however, indicates clearly that the changes for which an adjustment in compensation may be authorized are only those which affect the amount or quality of the work.

[5] The engineer is authorized to order 'such changes in the contract as are required for the proper completion of the work.'(s 7(b).) Such changes ***350** may result in additional compensation whenever they cannot 'be fairly and reasonably paid for at contract prices.'(s 7(e).) A change in the tax rate does not qualify under this provision because it has nothing whatever to do with 'proper completion of the work.'

Provision is also made for notification of 'changed conditions' which, if they 'materially increase or decrease the costs of any portion of the work,' may be the subject of an adjustment to compensation. (s 7(h).) However, the kinds of changed ****234** conditions provided for are (1) 'Subsurface or latent physical conditions at the site of the work differing materially from those represented in this contract,' and (2) 'Unknown physical conditions at the site of the work of an unusual nature differing materially from those ordinarily encountered.'A change of the tax rate does not fall into either of these categories.

The trial court's interpretation of the construction contract is therefore correct. In view of this determination, it is not necessary to pass upon the Department's contention raised by its appeal that a release signed by Western, covering all claims and demands arising under and by virtue of the contract, included its claim for additional compensation on account of the enhanced sales and use tax rate. The court, therefore, expresses no opinion on this question. [FN4]

> FN4. In view of the fact that this question has become moot and this court has not approved the trial court's decision in this respect, the judgment will be modified to eliminate it.

Claimed Impairment of Contract

Western contends that the imposition of the additional tax burden upon it in combination with the denial of its claim for further compensation unconstitutionally impairs the State's obligation under its contract. The constitutional provisions relied on are: (a) Article 1, section 10 of the Constitution of the United States, (b) the due process clause of the Fourteenth Amendment, and (c) Article 1, section 16 of the Constitution of California.

[6][7] Inasmuch as Western received the full fixed-price specified in its contract for the work, this contention amounts to the assertion that any increase in the tax burden incident to performance constituted an impairment of the obligation of its contract. Western concedes that an identical contract between it and a private owner would not be unconstitutionally impaired by any such increase. That concession is clearly required by well established case authority. In National Ice, etc. Co. v. Pacific F. Exp. Co., 11 Cal.2d 283, 79 P.2d 380, the application of the original sales tax law to a sale ***351** at a fixed price entered into before its enactment, though it imposed a substantial burden upon the retailer, was held not to impair the contract. The court said: 'the principle of law is well established that the existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the state to levy or to impose a tax which may adversely affect the financial interests of either or any of the parties . . ..' (11 Cal.2d at p. 294, 79 P.2d at p. 386.)A recent statement of this rule appears in Coast Bank v. Holmes, 19 Cal.App.3d 581, at page 596, 97 Cal.Rptr. 30, at page 39, the general principle announced in the cases is that both existing law and 'the reservation of the essential attributes of continuing governmental power' are 'read into' all contracts 'as a postulate of the legal order.'

Western maintains that no such reservation may be 'read into' a public contract. It relies in this connection upon two decisions of the United States Supreme Court and one from the First Circuit dealing with public contracts, and a line of California cases concerned with the pension rights of public employees.

Murray v. City of Charleston, 96 U.S. 432, 24 L.Ed. 760 (1877), held unconstitutional an ordinance whereby, after issuance of interest-bearing municipal obligations, the city levied a general personal property tax which applied to them and empowered itself to deduct the tax from the interest payments. The opinion of the court, however, makes it clear that it was the provision for automatic collection from the particular class of taxpayer (creditors of the city) that invalidated the law. The provision for deduction of the tax from the interest payment was described as 'a change of the express stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements,' (96 U.S. at p. 444) and the court made it clear that the interest once paid could have been ****235** taxed if it constituted properly having a situs within the city.[FN5]

> FN5. The holder of the municipal obligation in this case was a resident of Germany, and the court obviously did not think that there was any taxable asset in Charleston.

A more modern Supreme Court decision relied upon by Western is El Paso v. Simmons (1965) 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446. This case also involved legislation diminishing the rights of a party to a public contract, but in this case the legislation was upheld: the time within which a defaulting purchaser under a contract to buy public land could reinstate his contract, which had been unlimited, was cut to five years. Western's contention that the sole basis for upholding this impairment was that it constituted 'nothing but a modification of the remedy' is incorrect. The court expressly stated that it did not base its decision on that ground ***352** but rather upon the proposition that 'it is not every modification of a contractual promise that impairs the obligation of contract under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause.'(379 U.S. at pp. 506-507, 85 S.Ct. at 582.)The principle found to govern the case was stated by the court as follows:

'. . . The Blaisdell opinion, (Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413) which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that '(n)ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . This principle of harmonizing the constitu-

tional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' 290 U.S., at 434-435, 54 S.Ct., at 238-239. Moreover, the 'economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.' Id., at 437 (54 S.Ct., at 239). The State has the 'sovereign right . . . to protect the . . . general welfare of the people . . .. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary'.' East New York Savings Bank v. Hahn, 326 U.S. 230, 232-233, 66 S.Ct. 69, 71, 90 L.Ed. 34. As Mr. Justice Johnson said in Ogden v. Saunders, '(i)t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.' 12 Wheat. 213, 291, 6 L.Ed. 606.

'Of course, the power of a State to modify or affect the obligation of contract is not without limit. '(W)hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, Nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt As its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." (Emphasis added.) (379 U.S. at pp. 508-509, 85 S.Ct. at pp. 583.)

****236** [8] Under the holding of the court in El Paso, the application of the tax ***353** increase to Western was clearly valid. There is absolutely nothing in the record to suggest that the motive of the Legislature was other than that of raising general revenue to meet public need. Contractors under public contracts were not singled out for less favorable treatment than that accorded other contracting parties. They were in fact given a dispensation along with all others who had fixed-price construction contracts. Giving, as we must, 'respect (to) the 'wide discretion on the part of the legislature in determining what is and what is not necessary" this court can only conclude that the policy of this legislation was legitimate and it is therefore valid.

Under circumstances virtually identical to those presented by this appeal, the Court of Appeals in John McShain, Inc. v. District of Columbia, 92 U.S.App.D.C. 358, 205 F.2d 882, upheld the application of the District's sales and use tax to a contractor with an antecedent fixed-price construction contract with the District. In that case the court did not have the benefit of the subsequent opinion in El Paso v. Simmons. Its reasoning, however, fits exactly the criteria stated by the Supreme Court. In upholding the validity of the tax, the court said:

'. . . Nor does the statute impair a contractual obligation. The imposition of a new tax, or an increase in the rate of an old one, is one of the usual hazards of business enterprise: seldom, if ever, does such an event impair the obligation of a pre-existing contract. See Wiseman v. Gillioz, 1936, 192 Ark. 950, 96 S.W.2d 459. The Contract Clause, of course, is a limitation on state rather than federal action. Nevertheless, a measure of protection against contract impairment by the federal government is given by the Fifth Amendment. Perry v. United States, 1935, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912; Lynch v. United States, 1934, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434. But Congress was not here seeking to repudiate or render profitless petitioner's contracts with the United States and the District of Columbia. Rather, it sought additional tax revenues for the District, through a general statute affecting petitioner no more severely than others who made purchases and sales. Cf. O'Malley v. Woodrough, 1939, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289. There was no deprivation of petitioner's property without due process of law. . . .' (205 F.2d at pp. 883-884.)

It is unnecessary to discuss the public pension cases relied upon by Western. They involve legislation directly modifying the obligations of public contracts rather than incidental burdens created by general legislation.[FN6]

> FN6. The same is true of the opinion of the First Circuit in People of Porto Rico v. Havemeyer, 60 F.2d 10, also cited by appellant.

We hold that Western was not subjected to any unconstitutional impairment*354 of its contract with the Department as a result of any additional burden falling upon it by virtue of the increased tax. Having thus disposed of Western's contentions in this respect on their merits, we do not find it necessary to deal with the Board's argument asserting Western's lack of standing with respect to portions of the tax not directly paid by it.

The judgment in No. 927 659 is modified by striking therefrom paragraph 10 declaring the release given by Western does not bar its claim for additional compensation under the contract and, as so modified, is affirmed. The judgment in No. 986 775 is affirmed. Respondent State Board of Equalization only is to recover its costs on these appeals.

ALLPORT, Acting P.J., and COBEY, J., concur.
Cal.App. 1974.
Western Contracting Corp. v. State Bd. of Equalization
39 Cal.App.3d 341, 114 Cal.Rptr. 227

END OF DOCUMENT

shall be included in the annual Budget Bill.

SEC. 6. Section 5 of Chapter 491 of the Statutes of 1990 is amended to read:

Sec. 5. Section 2 of this act shall become operative on January 1, 1992, except that if federal law requires the repeal of the Lancaster-Montoya Appraisal Act on a date prior to that January 1, 1992, Section 2 shall become operative on that earlier date.

SEC. 7. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide the most efficient and rapid implementation that is consistent with applicable federal guidelines and time periods, it is necessary that this act take effect immediately.

CHAPTER 85

An act to amend Sections 6015, 6051, 6201, 6359, 6385, 6907, 6936, and 7102 of, to amend and repeal Sections 6359.6 and 6362 of, to add Sections 6051.2, 6201.2, 6359.5, and 6376.1 to, and to add and repeal Sections 6051.5 and 6201.5 of, the Revenue and Taxation Code, relating to taxation, and making an appropriation therefor, to take effect immediately, tax levy.

[Approved by Governor June 30, 1991. Filed with Secretary of State June 30, 1991.]

The people of the State of California do enact as follows:

SECTION 1. Section 6015 of the Revenue and Taxation Code is amended to read:

6015. (a) "Retailer" includes:

(1) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

(2) Every person engaged in the business of making sales for storage, use, or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption.

(3) Any person conducting a race meeting under Chapter 4 of Division 8 of the Business and Professions Code, with respect to horses which are claimed during such meeting.

(b) When the board determines that it is necessary for the efficient administration of this part to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, or employers under whom they operate or from whom they obtain the tangible personal property sold by them,

irrespective of whether they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors, or employers the board may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for purposes of this part.

(c) Notwithstanding subdivision (b), a newspaper carrier is not a retailer and the retailer is the publisher or distributor for whom the carrier delivers the newspapers. The publisher or distributor is responsible for the tax measured by the price charged to the customer by the carrier.

SEC. 2. Section 6051 of the Revenue and Taxation Code is amended to read:

6051. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3¾ percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4¾ percent on and after April 1, 1974, and to and including June 30, 1991, and at the rate of 5 percent thereafter.

SEC. 3. Section 6051.2 is added to the Revenue and Taxation Code, to read:

6051.2. (a) In addition to the taxes imposed by Section 6051 and any other provision of this part, for the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers at the rate of ½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on and after July 1, 1991.

(b) This section shall cease to be operative on the first day of the first month of the calendar quarter following notification to the board by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal that the revenues collected pursuant to this section and Section 6201.2 that are deposited in the Local Revenue Fund are either of the following:

(1) "General Fund proceeds of taxes appropriated pursuant to Article XIII B of the California Constitution," as used in subdivision (b) of Section 8 of Article XVI of the California Constitution.

(2) "Allocated local proceeds of taxes," as used in subdivision (b) of Section 8 of Article XVI of the California Constitution.

SEC. 4. Section 6051.5 is added to the Revenue and Taxation Code, to read:

6051.5. (a) In addition to the taxes imposed by Sections 6051 and 6051.2, for the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers at the rate of ½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on and after July 1, 1991.

(b) Subdivision (a) shall cease to be operative as of July 1, 1993, unless either of the following applies:

(1) (A) If the amount in the Special Fund for Economic Uncertainties, established pursuant to Section 16418 of the Government Code, as projected for June 30, 1993, is in excess of one billion five hundred million dollars ($1,500,000,000), not including the amount of revenue expected for the 1992–93 fiscal year attributable to subdivision (a), as certified pursuant to subparagraph (B), then subdivision (a) shall cease to be operative as of July 1, 1992.

(B) On or before May 25, 1992, the Director of Finance shall determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(2) (A) If the amount in the Special Fund for Economic Uncertainties, established pursuant to Section 16418 of the Government Code, as projected for June 30, 1993, is in excess of one billion five hundred million dollars ($1,500,000,000), not including the amount of revenue expected for the last six months of the 1992–93 fiscal year attributable to subdivision (a), as certified pursuant to subparagraph (B), then subdivision (a) shall cease to be operative as of January 1, 1993.

(B) On or before November 25, 1992, the Director of Finance shall determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(c) This section shall remain in effect only until January 1, 1994, and as of that date is repealed.

SEC. 5. Section 6201 of the Revenue and Taxation Code is amended to read:

6201. An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3¾ percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4¾ percent on or after April 1, 1974, and to and including June 30, 1991, and at the rate of 5 percent thereafter.

SEC. 6. Section 6201.2 is added to the Revenue and Taxatio Code, to read:

6201.2. (a) In addition to the taxes imposed by Section 6201 an any other provision of this part, an excise tax is hereby imposed o the storage, use, or other consumption in this state of tangibl personal property purchased from any retailer on or after July 1 1991, for storage, use, or other consumption in this state at the rat of ½ percent of the sales price of the property.

(b) This section shall cease to be operative on the first day of th first month of the calendar quarter following notification to th board by the Department of Finance of a final judicial determinatio by the California Supreme Court or any California court of appea that the revenues collected pursuant to this section and Sectio 6201.2 and deposited in the Local Revenue Fund are either of th following:

(1) "General Fund proceeds of taxes appropriated pursuant t Article XIII B of the California Constitution," as used in subdivisio (b) of Section 8 of Article XVI of the California Constitution.

(2) "Allocated local proceeds of taxes," as used in subdivision (b of Section 8 of Article XVI of the California Constitution.

SEC. 7. Section 6201.5 is added to the Revenue and Taxatio Code, to read:

6201.5. (a) In addition to the taxes imposed by Sections 6201 an 6201.2, an excise tax is hereby imposed on the storage, use, or othe consumption in this state of tangible personal property purchase from any retailer on or after the operative date of this section, fo storage, use, or other consumption in this state at the rate of percent of the sales price of the property on and after July 1, 199

(b) Subdivision (a) shall cease to be operative as of July 1, 199 unless either of the following applies:

(1) (A) If the amount in the Special Fund for Economi Uncertainties, established pursuant to Section 16418 of th Government Code, as projected for June 30, 1993, is in excess of on billion five hundred million dollars ($1,500,000,000), not includin the amount of revenue expected for the 1992–93 fiscal ye attributable to subdivision (a), as certified pursuant to subparagrap (B), then subdivision (a) shall cease to be operative as of July 1, 199

(B) On or before May 25, 1992, the Director of Finance sha determine and certify to the Governor, the Legislature, and th board the amount projected to be in the Special Fund for Econom Uncertainties on June 30, 1993.

(2) (A) If the amount in the Special Fund for Econom Uncertainties, established pursuant to Section 16418 of th Government Code, as projected for June 30, 1993, is in excess of or billion five hundred million dollars ($1,500,000,000), not includin the amount of revenue expected for the last six months of the 1992–9 fiscal year attributable to subdivision (a), as certified pursuant t subparagraph (B), then subdivision (a) shall cease to be operative a of January 1, 1993.

(B) On or before November 25, 1992, the Director of Finance shall determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(c) This section shall remain in effect only until January 1, 1994, and as of that date is repealed.

SEC. 8. Section 6359 of the Revenue and Taxation Code is amended to read:

6359. (a) There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this state of food products for human consumption.

(b) For the purposes of this section, "food products" include all of the following:

(1) Cereals and cereal products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, other than candy or confectionery, coffee and coffee substitutes, tea, and cocoa and cocoa products, other than candy or confectionery.

(2) Milk and milk products, milkshakes, malted milks, and any other similar type beverages which are composed at least in part of milk or a milk product and which require the use of milk or a milk product in their preparation.

(3) All fruit juices, vegetable juices, and other beverages, whether liquid or frozen, except bottled water, spirituous, malt or vinous liquors or carbonated beverages.

(c) For purposes of this section, "food products" do not include any of the following:

(1) Medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

(2) Snack foods. For purposes of this section, "snack foods" means cookies, crackers (excluding soda, graham, and arrowroot crackers), potato chips, snack cakes or pies, corn or tortilla chips, pretzels, granola snacks, popped popcorn, fabricated chips, and fabricated snacks. "Snack foods" include only items that are sold in a condition suitable for consumption without further processing such as cooking, heating, or thawing.

(d) None of the exemptions provided for in this section apply to any of the following:

(1) When the food products are served as meals on or off the premises of the retailer.

(2) When the food products are furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware whether provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

(3) When the food products are ordinarily sold for immediate consumption on or near a location at which parking facilities are

provided primarily for the use of patrons in consuming the produc purchased at the location, even though such products are sold on "take out" or "to go" order and are actually packaged or wrappe and taken from the premises of the retailer.

(4) When the food products are sold for consumption within place, the entrance to which is subject to an admission charge, excep for national and state parks and monuments, marinas, campgrounc and recreational vehicle parks.

(5) When the food products are sold through a vending machin

(6) When the food products sold are furnished in a form suitab for consumption on the seller's premises, and both of the followir apply:

(A) Over 80 percent of the seller's gross receipts are from the sa of food products.

(B) Over 80 percent of the seller's retail sales of food products a sales subject to tax pursuant to paragraph (1), (2), (3), or (7).

(7) When the food products are sold as hot prepared foc products.

(e) "Hot prepared food products," for the purposes of paragrap (7) of subdivision (d), include a combination of hot and cold foc items or components where a single price has been established f the combination and the food products are sold in such combinatio such as a hot meal, a hot specialty dish or serving, or a hot sandwic or a hot pizza, including any cold components or side item Paragraph (7) of subdivision (d) shall not apply to a sale for separate price of bakery goods or beverages (other than bouillo consommé, or soup), or where the food product is purchased cold frozen; "hot prepared food products" means those products, items components which have been prepared for sale in a heated conditic and which are sold at any temperature which is higher than the a temperature of the room or place where they are sold.

(f) The amendments to this section by the act adding th subdivision shall become operative on July 1, 1991.

SEC. 9. Section 6359.5 is added to the Revenue and Taxatic Code, to read:

6359.5. These are exempted from the taxes imposed by this pa the gross receipts from the sale of, and the storage, use, or oth consumption in this state of candy, confectionery, and snack foods (defined in paragraph (2) of subdivision (c) of Section 6359) sold c an irregular or intermittent basis by any nonprofit you organization listed or described in paragraph (3) of subdivision (l of Section 6361 if the organization's profits from those sales are use exclusively in furtherance of the purposes of the organization.

SEC. 10. Section 6359.6 of the Revenue and Taxation Code amended to read:

6359.6. (a) Notwithstanding Section 6359, there are exempte from the taxes imposed by this part the gross receipts from the sa of and the storage, use, or other consumption in this state noncarbonated and noneffervescent bottled water sold in individu

containers of one-half gallon or more in size.

(b) This section shall remain in effect only until July 1, 1991, and as of that date is repealed.

SEC. 11. Section 6362 of the Revenue and Taxation Code is amended to read:

6362. (a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

(c) This section shall remain in effect only until July 1, 1991, and as of that date is repealed.

SEC. 12. Section 6376.1 is added to the Revenue and Taxation Code, to read:

6376.1. (a) On and after July 1, 1991, there are exempted from the taxes imposed by this part an amount equal to an amount that is attributable to a ¼ percent rate of tax with respect to the following:

(1) The gross receipts from the sale of and the storage, use, or other consumption in this state of tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 1, 1991.

(2) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to July 1, 1991. For the purposes of this paragraph, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 1, 1991. For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice,

whether or not the right is exercised.

(b) From July 1, 1991, to the date on which the taxes imposed b Sections 6051.2 and 6201.2 cease to be operative pursuant t subdivision (b) of Section 6051.2 or subdivision (b) of Section 6201.2 there are exempted from the taxes imposed by this part an amoun equal to an amount that is attributable to a one-half of 1 percent rat of tax with respect to the following:

(1) The gross receipts from the sale of and the storage, use, c other consumption in this state of tangible personal property if th seller is obligated to furnish or the purchaser is obligated to purchas the property for a fixed price pursuant to a contract entered int prior to July 1, 1991.

(2) A lease of tangible personal property that is a continuing sal of the property for any period of time for which the lessor is obligate to lease the property for an amount fixed by the lease prior to Jul 1, 1991. For the purposes of this paragraph, the sale or lease c tangible personal property shall be deemed not to be obligate pursuant to a contract or lease for any period of time for which an party to the contract or lease has the unconditional right to terminat the contract or lease upon notice, whether or not that right exercised.

(3) The possession of, or the exercise of any right or power ove tangible personal property under a lease that is a continuin purchase of the property for any period of time for which the lesse is obligated to lease the property for an amount fixed by a leas entered into prior to July 1, 1991. For purposes of this paragraph, th storage, use, or other consumption of, or possession of, or exercise c any right or power over, tangible personal property shall be deeme not to be obligated pursuant to a contract or lease for any period c time for which any party to the contract or lease has th unconditional right to terminate the contract or lease upon notic whether or not the right is exercised.

(c) From July 1, 1991, to the date the taxes imposed by Sectio 6051.5 and 6201.5 cease to be operative, there are exempted from th taxes imposed by this part an amount equal to an amount that attributable to a ½ percent rate of tax with respect to the followin

(1) The gross receipts from the sale of and the storage, use, c other consumption in the state of tangible personal property if th seller is obligated to furnish or the purchaser is obligated to purchas the property for a fixed price pursuant to a contract entered in prior to July 1, 1991.

(2) A lease of tangible personal property that is a continuing sa of the property for any period of time for which the lessor is obligate to lease the property for an amount fixed by the lease prior to Ju 1, 1991. For the purposes of this paragraph, the sale or lease tangible personal property shall be deemed not to be obligate pursuant to a contract or lease for any period of time for which ar party to the contract or lease has the unconditional right to termina the contract or lease upon notice, whether or not that right

exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 1, 1991. For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

(d) On and after July 1, 1991, there are exempted from the taxes imposed by this part an amount equal to the tax imposed by this part, and on June 30, 1991, with respect to the sale or purchase of any tangible personal property that was exempt prior to the enactment of the act adding this section, with respect to the following:

(1) The gross receipts from the sale of and the storage, use, or other consumption in the state of tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 1, 1991.

(2) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to July 1, 1991. For the purposes of this paragraph, the sale or lease of tangible personal property shall be deemed not be be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 1, 1991. For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

SEC. 13. Section 6385 of the Revenue and Taxation Code is amended to read.

6385. (a) There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of tangible personal property, other than fuel and petroleum products, to a common carrier, shipped by the seller via the purchasing carrier's facilities under a bill of lading whether the freight is paid in advance,

or the shipment is made freight charges collect, to a point outside thi state and the property is actually transported to the out-of-stat destination for use by the carrier in the conduct of its business as common carrier.

(b) There are exempted from the computation of the amount c the sales tax the gross receipts from the sale of tangible persona property, other than aircraft fuel and petroleum products, purchase by a foreign air carrier and transported by the foreign air carrier facilities to a foreign destination for use by the air carrier in th conduct of its business as a common carrier by air of persons o property. To qualify for this exemption, the foreign air carrier sha furnish to the seller a certificate in writing that the property shall b transported and used in the manner required in this subdivision. Th certificate shall be substantially in the form prescribed by the boarc A seller is not liable for the sales tax if the seller accepts the certificat in good faith. If the seller does not have the certificate at the tim the board requests the seller to submit the certificate to the boarc the seller shall be given a reasonable time to request the foreign ai carrier to provide the seller with the certificate. The foreign ai carrier shall maintain records in this state, such as a copy of a bill c lading, and air waybill or cargo manifest, documenting it transportation of the tangible personal property to a foreig destination.

(c) "Common carrier," as used in this section, with respect t water transportation, shall be deemed to include any vessel engagec for compensation, in transporting persons or property in interstat or foreign commerce.

(d) "Foreign air carrier," as used in this section, means a foreig air carrier as defined in Section 1301 of Title 49 of the United State Code.

(e) Pursuant to subdivisions (a) and (b), any use of the propert by the purchasing carrier, other than that incident to the delivery c the property to the carrier and the transportation of the property b the carrier to an out-of-state destination and subsequent use in th conduct of its business as a common carrier, or a failure of the carrie to document its transporting the property to an out-of-stat destination, shall subject the carrier to liability for payment of sale tax as if it were a retailer making a retail sale of the property at th time of that use or failure, and the sales price of the property to shall be deemed to be the gross receipts from the retail sale.

SEC. 14. Section 6907 of the Revenue and Taxation Code amended to read:

6907. Interest shall be paid upon any overpayment of any amour of tax at a rate equal to the average of the bond equivalent rates c the 13-week treasury bills auctioned during the period for whic interest is paid. Interest shall be paid from the last day of the calenda month following the quarterly period for which the overpaymer was made; but no refund or credit shall be made of any intere imposed upon the person making the overpayment with respect t

the amount being refunded or credited.

The interest shall be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he or she has not already filed a claim, is notified by the board that a claim may be filed or the date upon which the claim is approved by the board, whichever date is the earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

SEC. 15. Section 6936 of the Revenue and Taxation Code is amended to read:

6936. In any judgment, interest shall be allowed at a rate equal to the average of the bond equivalent rates of the 13-week treasury bills auctioned during the period for which interest is paid. Interest shall be paid upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than 30 days, the date to be determined by the board.

SEC. 16. Section 7102 of the Revenue and Taxation Code is amended to read:

7102. The money in the fund shall, upon order of the Controller, be drawn therefrom for refunds under this part, and pursuant to Section 1793.25 of the Civil Code, or be transferred in the following manner:

(a) (1) All revenues, less refunds, derived under this part at the 4¾-percent rate, including the imposition of sales and use taxes with respect to the sale, storage, use, or other consumption of motor vehicle fuel which would not have been received if the sales and use tax rate had been 5 percent and if motor vehicle fuel, as defined for purposes of the Motor Vehicle Fuel License Tax Law (Part 2 (commencing with Section 7301)), had been exempt from sales and use taxes, shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance, and shall be transferred quarterly to the Transportation Planning and Development Account, a trust fund in the State Transportation Fund.

(2) All revenues, less refunds, derived under this part at the 4¾-percent rate, resulting from increasing after December 31, 1989, the rate of tax imposed pursuant to the Motor Vehicle Fuel License Tax Law on motor vehicle fuel, as defined for purposes of that law, shall be transferred quarterly to the Transportation Planning and Development Account, a trust fund in the State Transportation Fund.

(3) All revenues, less refunds, derived under this part at the 4¾-percent rate from the imposition of sales and use taxes on fuel, as defined for purposes of the Use Fuel Tax Law (Part 3 (commencing with Section 8601)), shall be estimated by the State

Board of Equalization, with the concurrence of the Department of Finance, and shall be transferred quarterly to the Transportation Planning and Development Account, a trust fund in the State Transportation Fund.

(4) All revenues, less refunds, derived under this part from a rate of more than 4¾ percent pursuant to Sections 6051.1 and 6201.1 for the period December 1, 1989, to June 5, 1990, inclusive, shall be transferred to the Disaster Relief Fund created by Section 16419 of the Government Code.

(5) All revenues, less refunds, derived under this part from a rate of more than 4¾ percent pursuant to Sections 6051.1 and 6201.1 for the period June 6, 1990, to December 31, 1990, inclusive, which is attributable to the imposition of sales and use taxes with respect to the sale, storage, use, or other consumption of tangible personal property other than fuel, as defined for purposes of the Use Fuel Tax Law (Part 3 (commencing with Section 8601)), shall be transferred to the Disaster Relief Fund created by Section 16419 of the Government Code.

(6) All revenues, less refunds, derived under this part from a rate of more than 4¾ percent pursuant to Sections 6051.1 and 6201.1 for the period June 6, 1990, to December 31, 1990, inclusive, which is attributable to the imposition of sales and use taxes with respect to the sale, storage, use, or other consumption of fuel, as defined for purposes of the Use Fuel Tax Law (Part 3 (commencing with Section 8601)), shall be transferred to the Disaster Relief Fund created by Section 16419 of the Government Code.

(7) All revenues, less refunds, derived under this part from the taxes imposed pursuant to Sections 6051.2 and 6201.2 shall be transferred to the Sales Tax Account of the Local Revenue Fund for allocation to cities and counties as prescribed by statute.

(b) The balance shall be transferred to the General Fund.

(c) The estimates required by subdivision (a) shall be based on taxable transactions occurring during a calendar year, and the transfers required by subdivision (a) shall be made during the fiscal year that commences during that same calendar year. Transfers required by paragraphs (1), (2), and (3) of subdivision (a) shall be made quarterly.

(d) The Legislature may amend this section, by statute passed in each house of the Legislature by rollcall vote entered in the journal, two-thirds of the membership concurring, if the statute is consistent with, and furthers the purposes of this section.

SEC. 17. The State Board of Equalization may adopt emergency regulations, regarding any change made by this act, in accordance with Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code.

SEC. 18. The amendments made to Sections 6907 and 6936 of the Revenue and Taxation Code by Sections 14 and 15 of this act shall apply to all refunds of taxes, including overpayments and judgments, made from the Retail Sales Tax Fund on or after July 1, 1991.

SEC. 19. The sum of four million nine hundred fifty-eight thousand dollars ($4,958,000) is hereby appropriated from the General Fund to the State Board of Equalization for startup costs to implement this act, as follows:

(a) For the 1990–91 fiscal year, six hundred twenty-four thousand dollars ($624,000).

(b) For the 1991–92 fiscal year, four million three hundred thirty-four thousand dollars ($4,334,000).

SEC. 20. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect. However, Sections 1 to 18, inclusive, of this act shall become operative on July 1, 1991, and shall apply to sales and purchases of tangible personal property made on and after July 1, 1991.

CHAPTER 86

An act to add Chapter 5.5 (commencing with Section 32220) to Part 14 of Division 2 of the Revenue and Taxation Code, relating to taxation, to take effect immediately, tax levy.

[Approved by Governor June 30, 1991. Filed with Secretary of State June 30, 1991.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 5.5 (commencing with Section 32220) is added to Part 14 of Division 2 of the Revenue and Taxation Code, to read:

CHAPTER 5.5. SURTAX ON BEER, WINE, AND DISTILLED SPIRITS

Article 1. Imposition of the Surtax

32220. On and after July 1, 1991, an excise surtax is hereby imposed upon all beer and wine sold in this state by a manufacturer, winegrower, or importer, and upon all distilled spirits sold in this state by a manufacturer, distilled spirits manufacturer's agent, brandy manufacturer, winegrower, importer, rectifier, wholesaler, common carrier with respect to distilled spirits sales made upon boats, trains, and airplanes, or persons licensed to sell distilled spirits upon boats, trains, and airplanes, and upon sellers of beer, wine, or distilled spirits with respect to which no tax has been paid within areas over which the United States government exercises jurisdiction, at the following rates:

(a) On all beer, sixteen cents ($0.16) per gallon and at a proportionate rate for any other quantity.

(b) On all still wines containing not more than 14 percent of absolute alcohol by volume, nineteen cents ($0.19) per wine gallon

and at a proportionate rate for any other quantity.

(c) On all still wines containing more than 14 percent of absolute alcohol by volume, eighteen cents ($0.18) per wine gallon and at a proportionate rate for any other quantity.

(d) On sparkling hard cider, eighteen cents ($0.18) per wine gallon and at a proportionate rate for any other quantity.

(e) On all distilled spirits of proof strength or less, one dollar and thirty cents ($1.30) per wine gallon and at a proportionate rate for any other quantity.

(f) On all distilled spirits in excess of proof strength, two dollars and sixty cents ($2.60) per wine gallon and at a proportionate rate for any other quantity.

32221. Except with respect to beer and wine in the internal revenue bonded premises of a manufacturer, and except with respect to distilled spirits in the possession of a distilled spirits manufacturer, distilled spirits manufacturer's agent, brandy manufacturer, rectifier, wholesaler, or common carrier licensed to sell distilled spirits on board boats, trains, and airplanes, floor stock taxes are hereby imposed in amounts equal to the surtaxes imposed by Section 32220 upon all alcoholic beverages upon which the surtaxes have not been paid, that are in the possession or under the control of every person licensed under Division 9 (commencing with Section 23000) of the Business and Professions Code at 2:01 a.m. on July 1, 1991. On or before August 31, 1991, each person subject to the tax imposed by this section shall prepare and file with the State Board of Equalization, on a form prescribed by the board, a return showing the amount of units of beer, wine, sparkling hard cider, and distilled spirits possessed by him or her at 2:01 a.m. on July 1, 1991, that are subject to the tax imposed by this section, and any other information the board deems necessary for the proper administration of this chapter. The taxpayer shall deliver the return, together with a remittance of the amount of tax due, to the office of the board on or before August 31, 1991.

32222. The taxes imposed by this article are in addition to any other tax imposed upon beer, wine, sparkling hard cider, or distilled spirits by this part.

32223. All the provisions of this part relating to excise taxes, with the exception of those contained in Chapter 10 (commencing with Section 32501), are applicable also to the taxes imposed by this article, to the extent that those provisions are not inconsistent with this article.

Article 2. Disposition of Proceeds

32230. All surtaxes, interest, and penalties imposed and required to be paid under this chapter shall be made in remittances to the State Board of Equalization and shall be deposited in the General Fund.

SEC. 2. This act provides for a tax levy within the meaning of

CHAPTER 88

An act to amend Sections 6051, 6051.2, 6051.5, 6201, 6201.2, 6201.5, 6359, 6359.6, 6362, 6376.1, 32220, and 32221 of the Revenue and Taxation Code, to amend Section 8 of Assembly Bill 758 of the 1991–92 Regular Session, and to amend Section 20 of Assembly Bill 2181 of the 1991–92 Regular Session, relating to taxation, to take effect immediately, tax levy.

[Approved by Governor June 30, 1991. Filed with Secretary of State June 30, 1991.]

The people of the State of California do enact as follows:

SECTION 1. Section 6051 of the Revenue and Taxation Code, as amended by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6051. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3¾ percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4¾ percent on and after April 1, 1974, and to and including July 14, 1991, and at the rate of 5 percent thereafter.

SEC. 2. Section 6051.2 of the Revenue and Taxation Code, as added by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6051.2. (a) In addition to the taxes imposed by Section 6051 and any other provision of this part, for the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers at the rate of ½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on and after July 15, 1991.

(b) This section shall cease to be operative on the first day of the first month of the calendar quarter following notification to the board by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal that the revenues collected pursuant to this section and Section 6201.2 that are deposited in the Local Revenue Fund are either of the following:

(1) "General Fund proceeds of taxes appropriated pursuant to Article XIII B of the California Constitution," as used in subdivision (b) of Section 8 of Article XVI of the California Constitution.

(2) "Allocated local proceeds of taxes," as used in subdivision (b) of Section 8 of Article XVI of the California Constitution.

SEC. 3. Section 6051.5 of the Revenue and Taxation Code, as added by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6051.5. (a) In addition to the taxes imposed by Sections 6051 and 6051.2, for the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers at the rate of ½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on and after July 15, 1991.

(b) This section shall cease to be operative as of July 1, 1993, unless either of the following applies:

(1) (A) If the amount in the Special Fund for Economic Uncertainties, established pursuant to Section 16418 of the Government Code, as projected for June 30, 1993, is in excess of one billion five hundred million dollars ($1,500,000,000), not including the amount of revenue expected for the 1992–93 fiscal year attributable to subdivision (a), as certified pursuant to subparagraph (B), then this section shall cease to be operative as of July 1, 1992.

(B) On or before May 25, 1992, the Director of Finance shall determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(2) (A) If the amount in the Special Fund for Economic Uncertainties, established pursuant to Section 16418 of the Government Code, as projected for June 30, 1993, is in excess of one billion five hundred million dollars ($1,500,000,000), not including the amount of revenue expected for the last six months of the 1992–93 fiscal year attributable to subdivision (a), as certified pursuant to subparagraph (B), then this section shall cease to be operative as of January 1, 1993.

(B) On or before November 25, 1992, the Director of Finance shall determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(c) This section shall remain in effect only until January 1, 1994, and as of that date is repealed.

SEC. 4. Section 6201 of the Revenue and Taxation Code, as amended by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6201. An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent

on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3¾ percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4¾ percent on or after April 1, 1974, and to and including July 14, 1991, and at the rate of 5 percent thereafter.

SEC. 5. Section 6201.2 of the Revenue and Taxation Code, as added by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6201.2. (a) In addition to the taxes imposed by Section 6201 and any other provision of this part, an excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 15, 1991, for storage, use, or other consumption in this state at the rate of ½ percent of the sales price of the property.

(b) This section shall cease to be operative on the first day of the first month of the calendar quarter following notification to the board by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal that the revenues collected pursuant to this section and Section 6201.2 and deposited in the Local Revenue Fund are either of the following:

(1) "General Fund proceeds of taxes appropriated pursuant to Article XIII B of the California Constitution," as used in subdivision (b) of Section 8 of Article XVI of the California Constitution.

(2) "Allocated local proceeds of taxes," as used in subdivision (b) of Section 8 of Article XVI of the California Constitution.

SEC. 6. Section 6201.5 of the Revenue and Taxation Code, as added by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6201.5. (a) In addition to the taxes imposed by Sections 6201 and 6201.2, an excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after the operative date of this section, for storage, use, or other consumption in this state at the rate of ½ percent of the sales price of the property on and after July 15, 1991.

(b) This section shall cease to be operative as of July 1, 1993, unless either of the following applies:

(1) (A) If the amount in the Special Fund for Economic Uncertainties, established pursuant to Section 16418 of the Government Code, as projected for June 30, 1993, is in excess of one billion five hundred million dollars ($1,500,000,000), not including the amount of revenue expected for the 1992–93 fiscal year attributable to subdivision (a), as certified pursuant to subparagraph (B), then this section shall cease to be operative as of July 1, 1992.

(B) On or before May 25, 1992, the Director of Finance shall

determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(2) (A) If the amount in the Special Fund for Economic Uncertainties, established pursuant to Section 16418 of the Government Code, as projected for June 30, 1993, is in excess of one billion five hundred million dollars ($1,500,000,000), not including the amount of revenue expected for the last six months of the 1992–93 fiscal year attributable to subdivision (a), as certified pursuant to subparagraph (B), then this section shall cease to be operative as of January 1, 1993.

(B) On or before November 25, 1992, the Director of Finance shall determine and certify to the Governor, the Legislature, and the board the amount projected to be in the Special Fund for Economic Uncertainties on June 30, 1993.

(c) This section shall remain in effect only until January 1, 1994, and as of that date is repealed.

SEC. 7. Section 6359 of the Revenue and Taxation Code, as amended by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6359. (a) There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this state of food products for human consumption.

(b) For the purposes of this section, "food products" include all of the following:

(1) Cereals and cereal products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, other than candy or confectionery, coffee and coffee substitutes, tea, and cocoa and cocoa products, other than candy or confectionery.

(2) Milk and milk products, milkshakes, malted milks, and any other similar type beverages which are composed at least in part of milk or a milk product and which require the use of milk or a milk product in their preparation.

(3) All fruit juices, vegetable juices, and other beverages, whether liquid or frozen, except bottled water, spirituous, malt or vinous liquors or carbonated beverages.

(c) For purposes of this section, "food products" do not include any of the following:

(1) Medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

(2) Snack foods. For purposes of this section, "snack foods" means cookies, crackers (excluding soda, graham, and arrowroot crackers), potato chips, snack cakes or pies, corn or tortilla chips, pretzels, granola snacks, popped popcorn, fabricated chips, and fabricated

heating, or thawing.

(d) None of the exemptions provided for in this section apply to any of the following:

(1) When the food products are served as meals on or off the premises of the retailer.

(2) When the food products are furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware whether provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

(3) When the food products are ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the location, even though such products are sold on a "take out" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer.

(4) When the food products are sold for consumption within a place, the entrance to which is subject to an admission charge, except for national and state parks and monuments, marinas, campgrounds, and recreational vehicle parks.

(5) When the food products are sold through a vending machine.

(6) When the food products sold are furnished in a form suitable for consumption on the seller's premises, and both of the following apply:

(A) Over 80 percent of the seller's gross receipts are from the sale of food products.

(B) Over 80 percent of the seller's retail sales of food products are sales subject to tax pursuant to paragraph (1), (2), (3), or (7).

(7) When the food products are sold as hot prepared food products.

(e) "Hot prepared food products," for the purposes of paragraph (7) of subdivision (d), include a combination of hot and cold food items or components where a single price has been established for the combination and the food products are sold in such combination, such as a hot meal, a hot specialty dish or serving, or a hot sandwich or a hot pizza, including any cold components or side items. Paragraph (7) of subdivision (d) shall not apply to a sale for a separate price of bakery goods or beverages (other than bouillon, consommé, or soup), or where the food product is purchased cold or frozen; "hot prepared food products" means those products, items or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold.

(f) The amendments to this section by the act adding this subdivision shall become operative on July 15, 1991.

SEC. 8. Section 6359.6 of the Revenue and Taxation Code, as amended by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6359.6. (a) Notwithstanding Section 6359, there are exempted

from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this state of noncarbonated and noneffervescent bottled water sold in individual containers of one-half gallon or more in size.

(b) This section shall remain in effect only until July 15, 1991, and as of that date is repealed.

SEC. 9. Section 6362 of the Revenue and Taxation Code, as amended by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6362. (a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

(c) This section shall remain in effect only until July 15, 1991, and as of that date is repealed.

SEC. 10. Section 6376.1 of the Revenue and Taxation Code, as added by Assembly Bill 2181 of the 1991–92 Regular Session, is amended to read:

6376.1. (a) On and after July 15, 1991, there are exempted from the taxes imposed by this part an amount equal to an amount that is attributable to a ¼ percent rate of tax with respect to the following:

(1) The gross receipts from the sale of and the storage, use, or other consumption in this state of tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 15, 1991.

(2) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to July 15, 1991. For the purposes of this paragraph, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 15, 1991. For purposes of this paragraph, the

storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

(b) From July 15, 1991, to the date on which the taxes imposed by Sections 6051.2 and 6201.2 cease to be operative pursuant to subdivision (b) of Section 6051.2 or subdivision (b) of Section 6201.2, there are exempted from the taxes imposed by this part an amount equal to an amount that is attributable to a one-half of 1 percent rate of tax with respect to the following:

(1) The gross receipts from the sale of and the storage, use, or other consumption in this state of tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 15, 1991.

(2) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to July 15, 1991. For the purposes of this paragraph, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 15, 1991. For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

(c) From July 15, 1991, to the date the taxes imposed by Sections 6051.5 and 6201.5 cease to be operative, there are exempted from the taxes imposed by this part an amount equal to an amount that is attributable to a ½ percent rate of tax with respect to the following:

(1) The gross receipts from the sale of and the storage, use, or other consumption in the state of tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 15, 1991.

(2) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to July

15, 1991. For the purposes of this paragraph, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 15, 1991. For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

(d) On and after July 15, 1991, there are exempted from the taxes imposed by this part an amount equal to the tax imposed by this part on July 14, 1991, with respect to the sale or purchase of any tangible personal property that was exempt prior to the enactment of the act adding this section, with respect to the following:

(1) The gross receipts from the sale of and the storage, use, or other consumption in the state of tangible personal property if the seller is obligated to furnish or the purchaser is obligated to purchase, the property for a fixed price pursuant to a contract entered into prior to July 15, 1991.

(2) A lease of tangible personal property that is a continuing sale of the property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to July 15, 1991. For the purposes of this paragraph, the sale or lease of tangible personal property shall be deemed not be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not that right is exercised.

(3) The possession of, or the exercise of any right or power over, tangible personal property under a lease that is a continuing purchase of the property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease entered into prior to July 15, 1991. For purposes of this paragraph, the storage, use, or other consumption of, or possession of, or exercise of any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not the right is exercised.

SEC. 11. Section 32220 of the Revenue and Taxation Code, as added by Assembly Bill 30 of the 1991–92 Regular Session, is amended

to read:

32220. On and after July 15, 1991, an excise surtax is hereby imposed upon all beer and wine sold in this state by a manufacturer, winegrower, or importer, and upon all distilled spirits sold in this state by a manufacturer, distilled spirits manufacturer's agent, brandy manufacturer, winegrower, importer, rectifier, wholesaler, common carrier with respect to distilled spirits sales made upon boats, trains, and airplanes, or persons licensed to sell distilled spirits upon boats, trains, and airplanes, and upon sellers of beer, wine, or distilled spirits with respect to which no tax has been paid within areas over which the United States government exercises jurisdiction, at the following rates:

(a) On all beer, sixteen cents ($0.16) per gallon and at a proportionate rate for any other quantity.

(b) On all still wines containing not more than 14 percent of absolute alcohol by volume, nineteen cents ($0.19) per wine gallon and at a proportionate rate for any other quantity.

(c) On all still wines containing more than 14 percent of absolute alcohol by volume, eighteen cents ($0.18) per wine gallon and at a proportionate rate for any other quantity.

(d) On sparkling hard cider, eighteen cents ($0.18) per wine gallon and at a proportionate rate for any other quantity.

(e) On all distilled spirits of proof strength or less, one dollar and thirty cents ($1.30) per wine gallon and at a proportionate rate for any other quantity.

(f) On all distilled spirits in excess of proof strength, two dollars and sixty cents ($2.60) per wine gallon and at a proportionate rate for any other quantity.

SEC. 12. Section 32221 of the Revenue and Taxation Code, as added by Assembly Bill 30 of the 1991–92 Regular Session, is amended to read:

32221. Except with respect to beer and wine in the internal revenue bonded premises of a manufacturer, and except with respect to distilled spirits in the possession of a distilled spirits manufacturer, distilled spirits manufacturer's agent, brandy manufacturer, rectifier, wholesaler, or common carrier licensed to sell distilled spirits on board boats, trains, and airplanes, floor stock taxes are hereby imposed in amounts equal to the surtaxes imposed by Section 32220 upon all alcoholic beverages upon which the surtaxes have not been paid, that are in the possession or under the control of every person licensed under Division 9 (commencing with Section 23000) of the Business and Professions Code at 2:01 a.m. on July 15, 1991. On or before August 31, 1991, each person subject to the tax imposed by this section shall prepare and file with the State Board of Equalization, on a form prescribed by the board, a return showing the amount of units of beer, wine, sparkling hard cider, and distilled spirits possessed by him or her at 2:01 a.m. on July 15, 1991, that are subject to the tax imposed by this section, and any other information the board deems necessary for the proper administration of this

chapter. The taxpayer shall deliver the return, together with a remittance of the amount of tax due, to the office of the board on or before August 31, 1991.

SEC. 13. Section 8 of Assembly Bill 758 of the 1991–92 Regular Session is amended to read:

Sec. 8. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect and shall be applied with respect to motor vehicle license fees for any original registration occurring on or after August 1, 1991, and for any renewal of registration with an expiration date of August 1, 1991, or an expiration date thereafter. However, Section 1 of this act shall become operative on August 1, 1991.

SEC. 14. Section 20 of Assembly Bill 2181 of the 1991–92 Regular Session is amended to read:

Sec. 20. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect. However, Sections 14, 15, and 18 of this act shall become operative on July 1, 1991, and Sections 1 to 13, inclusive, of this act and Sections 16 and 17 of this act shall become operative on July 15, 1991, and shall apply to sales and purchases of tangible personal property made on and after July 15, 1991.

SEC. 15. Sections 1 to 10, inclusive, and Section 14 of this act shall become operative only if Assembly Bill No. 2181 of the 1991–92 Regular Session is chaptered before this act is chaptered and AB 2181, among other things, amends Sections 6051, 6201, 6359, 6359.6, and 6362 of, and adds Section 6051.2, 6051.5, 6201.2, 6201.5, and 6376.1 to, the Revenue and Taxation Code.

SEC. 16. Sections 11 and 12 of this act shall become operative only if Assembly Bill 30 of the 1991–92 Regular Session is chaptered before this act is chaptered and AB 30 adds Sections 32220 and 32221 to the Revenue and Taxation Code.

SEC. 17. Section 13 of this act shall become operative only if Assembly Bill No. 758 of the 1991–92 Regular Session is chaptered before this act is chaptered.

SEC. 18. Notwithstanding Section 2230 of the Revenue and Taxation Code, no appropriation is made by this act, and the state shall not reimburse any local agency for any sales and use tax revenues lost by it under this act.

SEC. 19. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect.

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further finds and declares

that this treatment of revenues and expenditures does not constitute a precedent for future state fiscal policy.

SEC. 11.

SEC. 12. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide funding for timely relief in regard to injuries, damages, and losses suffered as a result of the earthquake, aftershocks, and any other related casualty occurring in northern California in October 1989, it is necessary that this act go into immediate effect.

CHAPTER 14

An act to add Article 7.7 (commencing with Section 16419) to Chapter 2 of Division 4 of Title 2 of the Government Code, and to amend Section 7102 of, and add Sections 6051.1, 6201.1, 6376, 12637, 43158, and 45156 to, the Revenue and Taxation Code, relating to taxation, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor November 6, 1989. Filed with Secretary of State November 7, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Article 7.7 (commencing with Section 16419) is added to Chapter 2 of Division 4 of Title 2 of the Government Code, to read:

Article 7.7. Disaster Relief Fund

16419. The Disaster Relief Fund is hereby established. Notwithstanding Section 13340, the fund is continuously appropriated without regard to fiscal years for purposes of funding disbursements made for response to and recovery from the earthquake, aftershocks, and any other related casualty. Moneys in the Disaster Relief Fund may, upon the direction of the Director of Finance, be transferred to the Special Fund for Economic Uncertainties to replenish that fund for disbursements regarding the earthquake, aftershocks, and any other related casualty. Disbursements from the Disaster Relief Fund and from the Special Fund for Economic Uncertainties incurred in responding to and recovering from the earthquake, aftershocks, and any other related casualty shall not be expended to supplant federal funds otherwise available in the absence of state financial relief.

SEC. 2. Section 6051.1 is added to the Revenue and Taxation

Code, to read:

6051.1. (a) Notwithstanding Section 6051, for the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 5 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on and after the operative date of this subdivision.

(b) Subdivision (a) shall become operative on December 1, 1989, and shall cease to be operative on January 1, 1991.

(c) The rate prescribed by Section 6051 shall be applicable on and after the first day following the date subdivision (a) ceases to be operative pursuant to subdivision (b).

SEC. 3. Section 6201.1 is added to the Revenue and Taxation Code, to read:

6201.1. (a) Notwithstanding Section 6201, an excise tax is hereby imposed on the storage, use, or other consumption in the state of tangible personal property purchased from any retailer on or after the operative date of this subdivision, for storage, use, or other consumption in this state at the rate of 5 percent of the sales price of the property on and after the operative date of this subdivision.

(b) Subdivision (a) shall become operative on December 1, 1989, and shall cease to be operative on January 1, 1991.

(c) The rate prescribed by Section 6201 shall be applicable on and after the first day following the date subdivision (a) ceases to be operative pursuant to subdivision (b).

SEC. 4. Section 6376 is added to the Revenue and Taxation Code, to read:

6376. (a) From December 1, 1989 to December 31, 1990, there are exempted from 5 percent of the taxes imposed by this part, the gross receipts from the sale of and the storage, use, or other consumption in this state of material, fixtures, and supplies if the sale, storage, use or other consumption in this state of the material, fixtures, or supplies are obligated pursuant to an engineering construction project contract or a building construction contract entered into for a fixed price prior to the effective date of this section.

(b) From December 1, 1989 to December 31, 1990, inclusive, there is exempted from 5 percent of the taxes imposed by this part, a lease of tangible personal property which is a continuing sale and purchase of that property for any period of time for which the lessor is obligated to lease the property for an amount fixed by the lease prior to the effective date of this section.

(c) For the purposes of this section, the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the right to terminate the contract or lease upon notice, whether or not that right is exercised.

SEC. 5. Section 7102 of the Revenue and Taxation Code is amended to read:

7102. The money in the fund shall, upon order of the Controller,

be drawn therefrom for refunds under this part, and pursuant to Section 1793.25 of the Civil Code, or be transferred in the following manner:

(a) (1) All revenues, less refunds, derived under this part at the 4¾-percent rate, including the imposition of sales and use taxes with respect to the sale, storage, use, or other consumption of motor vehicle fuel which would not have been received if the sales and use tax rate had been 5 percent and if motor vehicle fuel, as defined for purposes of the Motor Vehicle Fuel License Tax Law (Part 2 (commencing with Section 7301)), had been exempt from sales and use taxes, shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance and shall be transferred during each fiscal year to the Transportation Planning and Development Account in the State Transportation Fund for appropriation pursuant to Section 99312 of the Public Utilities Code.

(2) All revenues, less refunds, due to the imposition of sales and use taxes on fuel, as defined for purposes of the Use Fuel Tax Law (Part 3 (commencing with Section 8601)), at the 4¾-percent rate shall be transferred during each fiscal year to the Transportation Planning and Development Account for appropriation pursuant to Section 99312 of the Public Utilities Code.

(b) All revenues, less refunds, derived under this part at the 4¾-percent rate, resulting from increasing, after December 31, 1989, the rate of the tax imposed pursuant to the Motor Vehicle Fuel License Tax Law on motor vehicle fuel, as defined for purposes of that law, shall be transferred during each fiscal year to the Transportation Planning and Development Account for appropriation pursuant to Section 99312 of the Public Utilities Code.

(c) All revenues, less refunds, derived under this part from a rate of more than 4¾ percent pursuant to Sections 6051.1 and 6201.1 shall be transferred to the Disaster Relief Fund created by Section 16419 of the Government Code.

(d) The balance shall be transferred to the General Fund.

(e) The estimate required by subdivisions (a) and (b) shall be based on taxable transactions occurring during a calendar year, and the transfers required by subdivision (a) shall be made during the fiscal year that commences during that same calendar year. Transfers required by paragraphs (1) and (2) of subdivisions (a) and (b) shall be made quarterly.

SEC. 6. Section 12637 is added to the Revenue and Taxation Code, to read:

12637. If the board finds that a person's failure to make a timely return or payment was due to disaster, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of interest provided for by Sections 12258, 12287, 12307, 12631, and 12632. Any person seeking to be relieved of interest shall file with the board a statement under penalty of perjury setting forth the facts upon which he or she bases his or her claim for relief.

appropriated pursuant to Article XIII B" within the meaning of either Section 8 of Article XVI of the California Constitution or Section 41202 of the Education Code.

(c) The Legislature finds and declares that the treatment of revenues and expenditures in this act is necessitated by the extraordinary need to provide emergency financial assistance to those institutions and individuals affected by the October 17, 1989 earthquake in the San Francisco Bay Area and its related aftershocks. Pursuant to the authority of subdivision (c) of Section 8 of Article XVI of the California Constitution, the Legislature hereby suspends for the 1989–90 fiscal year Section 8 of Article XVI of the California Constitution to the extent that its provisions conflict with this act with respect to disaster relief provided during the 1989–90 First Extraordinary Session. The Legislature further finds and declares that this treatment of revenues and expenditures does not constitute a precedent for future state fiscal policy.

SEC. 11. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide funding for timely relief in regard to injuries, damages, and losses suffered as a result of the earthquake, aftershocks, and any other related casualty occurring in northern California in October 1989, it is necessary that this act go into immediate effect.

CHAPTER 15

An act to amend Section 16418 of, and to add Sections 24304.8, 24304.9, and 24304.10 to, the Government Code, and to amend Sections 197, 197.1, 197.2, 197.3, 197.5, 197.6, 197.9, 198.1, 17207, and 24347.5 of the Revenue and Taxation Code, relating to taxation, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor November 6, 1989. Filed with Secretary of State November 7, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 16418 of the Government Code is amended to read:

16418. (a) The Special Fund for Economic Uncertainties is hereby created in the State Treasury and is continuously appropriated for the purposes of this section. The contingency reserve for economic uncertainties established within the General Fund by Section 12.3 of the Budget Act of 1980 is hereby discontinued, and any balance in that reserve shall be transferred to

Response to Argument that 1% Sales Tax Increase Dispute is Equivalent to the Wage Order 16 Dispute

Gentlemen,

This document will provide Caltrans' position on the relevance of the FCI arbitration decision regarding Wage Order 16 (WO 16) to this dispute regarding the 1% increase in sales tax that went into effect on April 1, 2009. In this response, Caltrans will prove that the WO16 decision is not relevant to this sales tax dispute, the WO 16 arbitration ruling is non-precedent setting, and the arbitrator's decision is both legally and contractually flawed.

In arbitration, FCI argued that WO 16 added "extra work" that increased the amount of resources and time required to complete the project. The 1% sales tax increase has no effect on the amount of resources, nature of the work, or the means, methods, manner, or time required to perform the work. The increase in sales tax did not delay or in any other way impact the performance of work under this contract or the work contemplated and embraced by the contract.

For the record, be advised that not all WO 16 disputes have been resolved by Caltrans. Those that were resolved were done so under negotiated settlements, i.e. not based on contractual entitlement, and usually resolved as part of confidential negotiated global settlements.

I. Complaint in Arbitration

FCI's "Complaint in Arbitration" to the California Office of Administrative hearings argued that WO 16 required the contractor to perform "additional work" and incur additional cost as a result of this additional work due to "loss of production for rest periods, delays, interruption of productive operations, and additional labor, equipment, and supervision hours."

Caltrans Position: The increase in the sales tax did not add any work to the project and has no effect on production, time, labor, equipment, or supervision hours.

FCI's complaint includes a DRB recommendation that acknowledged Caltrans position in this dispute that the contract "work" did not change; however, it claimed that WO 16 delayed the contract "work" and that "delay" was not contemplated and embraced under the contract.

Caltrans Position: The increase in the sales tax does not "delay" the contract work, and in fact has no effect on the "work" as defined, contemplated and embraced under the contract.

Standard Specifications Section 7-1.03, "Payment of Taxes," contemplates that payment of the contract item prices is all the compensation required from Caltrans to pay the contractor for all taxes the contractor is required to pay. This section further expressly contemplates that no relief of sales tax on materials is allowed.

FCI stated that WO 16 added new and unforeseen work and requested an adjustment in compensation "due to increased work required as a result of Wage Order 16," citing Section 4-1.03D, "Extra Work," as its basis.

Caltrans Position: The increase in the sales tax did not increase the "work" as defined, contemplated and embraced under the contract and, therefore, Standard Specifications Section 4-1.03, "Extra Work," does not apply.

II. Arbitrator's Ruling on Entitlement re: Wage Order 16

The arbitrator ruled that WO 16 required "additional work" as a result of "changes in working conditions."

Caltrans Position: The increase in the sales tax did not add any work to the contract or change the working conditions. The means and methods remain the same and the manner in which the work is to be performed remains unaffected by the increase in sales tax.

The arbitrator ruled that Standard Specifications Section 7-1.01, "Laws to be Observed," "ordered" the contractor to comply with WO 16 and WO 16 affected a material change in character of the work. The arbitrator concluded that Standard Specifications Section 4-1.03C, "Changes in Character of Work," provided the contractual basis for an equitable adjustment, even in the absence of any breach of contract by Caltrans. The arbitrator also ruled that, though compliance with WO 16 did not increase the physical scope of work, it did materially alter work rules, resulting in new and unforeseen changes in working conditions. He ruled that this provided FCI a contractual basis for recovery of additional costs for complying with Wage Order 16 under Standard Specifications Section 4-1.03D, "Extra Work."

Caltrans Position: This arbitrator's ruling is illogical, legally incorrect, and contractually flawed.

When WO 16 was issued, FCI correctly concluded that it must comply with this legal requirement and voluntarily did so. Legal compliance is clearly contemplated by the contract and is a central underpinning of common law and contracting. Compliance with the contract is not an order by Caltrans. Caltrans never recognized this change, never issued a contract change order, and made no such order to FCI.

The Arbitrator concluded that WO 16 affected a material change in character of the work and resulted in new and unforeseen changes in working conditions.

Caltrans Positions: The arbitrator's rational here is also flawed. Standard Specifications Section 4-1.03C, "Changes is Character of Work," apply only to changes in the plans and specifications. The arbitrator did not show where Wage Order 16 affected a change to the plans and specifications. He ruled that Wage Order 16 affected a change to the working conditions, but did not and cannot state which part of the plans or specifications were changed.

With regard to this dispute, the increase in the sales tax did not affect a change to the work so there can be no change in character of the work.

Since the increase in the sales tax does not add any work or change the working conditions; there is no extra work.

Since there is no change in character of the work or extra work, there is no contractual basis for the demand for an adjustment of compensation.

The arbitrator's ruling also addressed the issue of risk for an unforeseen change. The arbitrator ruled that the language in Standard Specifications Section 9-1.02, "Scope of Payment," that requires the contractor to accept "all risks of every description in connection with the prosecution of the work" is limited to the work contemplated and embraced under the contract. The arbitrator ruled that Wage Order 16 caused a material change in the contractor's working conditions or work rules, i.e. added work to the project beyond that which was contemplated or embraced at bid time.

Caltrans Position: Tax issues such as those in dispute here are contemplated and embraced by the contract under Standard Specifications Sections 7-1.03, "Payment of Taxes," which expressly contemplates that no relief of sales tax on materials is allowed, and 9-1.02, "Scope of Payment," which provides for payment of the risk associated with possibility that the

sales tax may increase during a time of fiscal crisis. And, as stated previously, the increase in the sales tax did not change the working conditions or add any work to the contract.

The arbitrator ruled that Caltrans was correct in invoking the Sovereign Acts Doctrine "to the extent that the acts of the IWC (California Industrial Wage Commission) in its regulatory capacity do not automatically and conclusively entitle FCI to recover from Caltrans as the state in a contracting capacity." (emphasis added)

The arbitrator concluded that there can be exceptions to the Sovereign Acts Doctrine if provisions are placed in the contract specifically for those exceptions. He further said that the Standard Specifications did have exceptions that applied to the alleged expanded work. That is, since the Standard Specifications allow for adjustments in compensation for work that falls outside that which was contemplated and embraced at bid time, i.e. a change in working conditions, there are exceptions provided for in the contract to compensate contractors for the extra work required as a result of WO 16.

Caltrans Position: Caltrans agrees that the contract allows adjustment in compensation in certain specific circumstances such as: increased or decreased quantities, changes in character of the work, extra work, differing site conditions, and right of way delays. None of these provisions apply to the 1% sales tax increase dispute, however. The increase in the sales tax did not change the work, working conditions, means and methods, or the manner in which the work was to be performed.

There is no provision in the contract that would constitute an exception to the Sovereign Acts Doctrine to compensate the contractor for a sales tax increase on the material purchased for the project. In fact, Standard Specifications Section 7-1.03, "Payment of Taxes" specifically prohibits Caltrans from furnishing the contractor with any document that would exempt the contractor from payment of any tax on materials or any other items furnished pursuant to the contract.

Therefore, the logic followed by the arbitrator with regard to the Sovereign Acts Doctrine in the Wage Order 16 dispute does not apply to the 1% sales tax increase dispute. That is, with an increase in sales tax, there is no ordered change, there is no change in character of the work, there is no extra work, there are no contractual provisions that allow for adjustment in compensation for sales tax relief, and such tax issues are contemplated and embraced under the contract under Standard Specifications Section 7-1.03 and 9-1.02.

In his conclusion and consistently throughout the ruling, the Arbitrator maintains that the reason for deciding that the contractor is entitled to compensation is "unforeseen changes in working conditions" and "unforeseen additional work" brought forth by virtue of the implementation of WO 16.

Caltrans Position: While the contract provides for additional compensation for new and unforeseen "work," it does not provide for additional compensation for everything that is new and unforeseen. The arbitrator did not rule in the contractor's favor merely due to the change in law that affected the contractor's cost. It was the alleged effect of the law on the contractor's operation, i.e. change in working conditions that affected the manner of the work, which formed the basis for his ruling.

The increase in the sales tax did not add any work to the contract or change the working conditions or work rules, the means and methods remained the same, and the manner in which the work was to be performed was unaffected by the increase in sales tax.

III. Conclusions

The reasons put forward by FCI requesting compensation for the effects of WO 16 due to loss of production for rest periods, delays, interruption of productive operations, and additional labor, equipment, and supervision hours, are not relevant to and do not apply to this sales tax dispute.

What is at issue is a 1% increase in the cost of materials – costs that often increase or decrease for various reasons external to the contract for which no adjustment in compensation is allowed under the contract. This dispute has nothing to do with changes to the "work" as defined, contemplated or embraced under the contract, as was alleged in the WO 16 dispute.

FCI has argued that WO 16 added work to the contract and caused delays to its completion since WO 16 required it to safely secure their work site prior to each break, allow time for workers to move to a safe location designated for the breaks, and then re-commence work after each break. An increase in sales tax certainly does not add work, cause any delays to the contract, or require the contractor to do anything differently with regard to the contract.

Moreover, the rationale used by the arbitrator that the contractor's compliance with the contract is equivalent to an "order" by the Department is flawed. Further, the ruling did not show any change made to either the plans or specifications, nor can any be shown in this dispute. Neither that rational nor the foundation that the arbitrator used to find in favor of the contractor, i.e. "unforeseen changes in working conditions" and "unforeseen additional work," apply to the dispute currently under consideration here.

In the WO16 dispute, FCI stated that the work associated with compliance with the new law was not contemplated or embraced at bid time and the Contractor is attempting to make the same argument with regard to the dispute in question here. The sales tax issue is specifically contemplated and embraced by Standard Specifications Section 7-1.03, "Payment of Taxes". Not only does it provide that payment of all the taxes the contractor is required to pay is included in the contract item prices paid by Caltrans, it specifically precludes Caltrans from furnishing the contractor any document designed to exempt the contractor from payment of any tax on materials. **This is a very significant difference between the WO 16 dispute and that of the 1% sales tax increase.**

It prohibits awarding any additional compensation to the Contractor related to sales taxes on its materials. That is, payment of sales taxes and the risk of a sales tax increase is expressly contemplated and embraced in the scope of payment as included under Standard Specifications Sections 7-1.03, "Payment of Taxes," and Section 9-1.02, "Scope of Payment."

The case law cited in the arbitrator's ruling regarding WO 16 did not include the case law cited in Caltrans's position paper regarding the 1% sales tax dispute, i.e. *Western Contracting Corporation v. State Board of Equalization.* While the case law cited in the arbitrator's ruling did deal with changes in law and their effect on ongoing contracts, the *Western Contracting* case speaks specifically to the issue of an increase in sales tax that occurs during the work on an ongoing contract. **It set the precedent that a department of the state who is a party to a fixed-price, public works contract has no obligation to compensate a contractor for increased costs resulting from an increase to the sales tax.**

Finally, this WO 16 arbitration is represented by Contractors as "case law." Legally, this WO 16 arbitration does not rise to the level of "case law," nor does it set any legal "precedent." *Western Contracting Corporation v. State Board of Equalization* is directly applicable to this dispute and sets the legal precedent for this 1% sales tax increase dispute.

Thank you for this opportunity to discuss the differences between the two disputes and for your consideration of this issue.

APPENDIX D

Exhibits

NOPC 10
Potential Claim for Temporary 1% Increase in Statewide Sales & Use Tax

Ben Ghafghazi, P.E.
Resident Engineer
District 4 Construction
California Department of Transportation

Caltrans

Description of the Dispute

- Contractor is requesting additional compensation for costs incurred due to a temporary 1% increase in the statewide Sales and Use Tax enacted as a result of the passage of Assembly Bill 3.
- The Department finds no legal or contractual provision authorizing or obligating it to pay such costs.

General Background

- Assembly Bill 3 (Evans)
  - Revenue-generating bill
  - Temporarily increased the statewide Sales and Use Tax on material purchased between April 1, 2009 and June 30, 2011.
  - Tax also charged for material purchased prior to but not possessed as of April 1, 2009.
  - No exemption for public works, fixed price contracts. (Prior sales tax increases in 1990 and 1991 had exemptions for public works, fixed price contracts)

Contractor's Position

- At bid time MCM could not have reasonably anticipated the additional costs necessary to complete the project once they were subject to the increased sales tax.
- The 1% increase in the sales and use tax was not contemplated or embraced under the contract.
- Sales tax increase as directed by the State constitute a change in the contract provisions; therefore the State should compensate the contractor for changes in tax rates.

Authority of DRB To Decide the Dispute

SP's Section 5-1.12 "Dispute Review Boards"

- *To assist in the resolution of disputes or potential claims arising out of the work of this project*
- Decide on disputes resulting from an act or order of the Engineer.
- Must adhere to DRB agreement
  - Resolve disputes *arising from the performance of the contract.*
  - Must be qualified to adjudicate on issues.

- The tax increase did not arise from the performance of the contract, or from any decision, act, or order of the Engineer.
- DRB members are not qualified to adjudicate issues of constitutional law.

DRB Standard for Review of Disputes

- DRB recommendations:

  "...shall be based on the facts and circumstances involved in the dispute, pertinent contract provisions, applicable laws and regulations."

- "Fairness" argument.

Important Definitions

- "Fixed Price Contract" (per BusinessDictionary.com):

  Contract that provides for a price which normally is not subject to any adjustment unless certain provisions (such as contract change, economic pricing, or defective pricing) are included in the agreement. These contracts are negotiated usually where reasonably definite specifications are available, and costs can be estimated with reasonable accuracy. A fixed price contract places minimum administrative burden on the contracting parties, but subjects the contractor to the maximum risk arising from full responsibility for all cost escalations. (emphasis added)

- "Work" (per Standard Specifications Section 1-1.48):

  All the work specified, indicated, shown or contemplated in the contract to construct the improvement, including all alterations, amendments or extensions thereto made by contract change order or other written orders of the Engineer. (emphasis added)

Caltrans Position

- Dispute arose from events external to the contract
- No Breach of contract
- No Ordered Change by the Department
- Contractor required to honor its bid item prices, i.e. fixed price contract
- Changes in Contractor's costs do not cause changes in bid prices
- Increased sales tax resulted from a sovereign act beyond the Department's control

CALTRANS POSITION (CONTINUED)

- No effect on the work
- No effect on means & methods
- None of the allowable contractual adjustments in compensation apply:
  - No increase or decrease in quantities
  - No differing site conditions
  - No right of way delays
  - No change in character of the work
  - No extra work

AB 3 AND AB 1523

EVENTS LEADING TO ENACTMENT OF AB 3 AND THE PROPOSAL OF AB 1523

- Assembly Bill 3 (Evans)
  - Budget crisis.
  - No exemption for fixed price contracts.
  - Indication of Legislature's intent that the increased sales tax be paid.
- Assembly Bill 1523 (Calderon)
  - Prompted by a request by industry organizations to exempt fixed price contracts.
  - Bill currently held in appropriations (Per HQ Legislative Affairs).
  - Indication that Industry recognizes need for exemption.
  - Not likely to pass.

Caltrans Position (Continued)
Applicable Law

- No legal requirement or authority to reimburse the Contractor.
- Case Law – Western Contracting Corp. v. State Board of Equalization
  - Contractor is not entitled to additional compensation due to tax increase.
  - Applies to ALL costs not specifically exempted.
  - Contract price paid includes full compensation for all taxes the Contractor must pay.
  - Contract "changes" refers to changes in the scope of work.
  - *Western* Court found support in U.S. Supreme Court and Federal Court rulings.

against the Board was that Western 'take nothing.'

> FN3. Continental Leasing Corporation, a lessor of equipment to Western, brought a third action (No. 986 787), seeking refund of sales tax paid by it. This action, which was consolidated for trial with Western's two lawsuits, does not require further discussion inasmuch as Continental's appeal has been dismissed.

Western appealed from those portions of the declaratory judgment adverse to it and from the judgment against it on the refund claim. The Department filed an appeal from the portion of the judgment denying its defense based upon the release.

None of the appealing parties questions the findings of fact made by the trial court. The issues, therefore, relate to the propriety of the court's conclusions based thereon.

Issues

There are three issues which require determination on this appeal. They are:

1. Did section 6376, properly construed, provide an exemption from the increase in sales and use tax with respect to the construction equipment and supplies utilized in the performance of Western's contract?

2. Does the contract between Western and the Department provide for additional compensation to Western equal to the increased tax burden borne by it?

3. Is there an impairment of the obligation of Western's contract if the exemption is not applicable and it receives no additional compensation?

As will hereafter appear, other issues raised by the parties do not require resolution in view of the decision reached with respect to the above issues.

Interpretation of Section 6376

Section 6376 has never been interpreted in any decided case brought to the attention of this court. The evidence of its legislative history is limited, consisting solely of a statement by Senator Coombs in the course of proceedings before the State Board of Equalization on November 8, 1967, to the effect that as originally drafted, the words 'tangible personal property' appeared where the words 'material and fixtures' appear in the first paragraph of the section as enacted. The change was made 'during the course of the discussions of the Conference Committee' at the suggestions of a member of the staff of the Board. The Board argues that this history supports its interpretation of section 6376 because its staff member in recommending the use of the words 'material and fixtures' had clearly in mind the meaning ascribed to them in Ruling 11. Assuming this to be a fact, it is of little help in the interpretation of the statute unless such ***347** understanding was communicated to the members of the Legislature, and there is no evidence that it was.

A second argument advanced by the Board also lacks merit. The Board contends that the use and consumption of the construction equipment and supplies was not 'obligated' under the terms of the contract with the Department because the contract does not 'describe the types of tools or equipment which must be used.'However, section 6(g) of the contract generally requires the contractor 'to provide and use on the work only such construction equipment and plant as are capable of producing the quality and quantity of work and materials required by the contract within the time or times specified.'Consequently, though there may have been no specifications of the type described in section 6(h) of said contract 'providing that construction****232** equipment of a particular size or type is to be used,' it is obvious that large amounts of massive construction equipment consuming vast quantities of fuel and other supplies were necessarily involved in the performance of the contract.

[1] The more persuasive argument urged by the Board is based upon the fact that Ruling 11 had been in effect and widely applied in the administration of the Sales and Use Tax Law for over 20 years at the time section 6376 was enacted. The propriety of the classifications of tangible personal property set forth in Ruling 11, including 'materials' and 'fixtures,' had

Issues

There are three issues which require determination on this appeal. They are:

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2. Does the contract between Western and the Department provide for additional compensation to Western equal to the increased tax burden borne by it?

3. Is there an impairment of the obligation of Western's contract if the exemption is not applicable and it receives no additional compensation?

CT Position Paper Appendix C-6

CALTRANS POSITION (CONTINUED)
CASE LAW SPECS SIMILAR TO CT SPECS

[3] Both the language and the legislative history.

7-1.03 PAYMENT OF TAXES

The contract prices paid for the work shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by Federal, State or local government, including, without being limited to, Federal excise tax. No tax exemption certificate nor any document designed to exempt the Contractor from payment of any tax will be furnished to the Contractor by the Department, as to any tax on labor, services, materials, transportation, or any other items furnished pursuant to the contract.

Caltrans Standard Specifications

[4] The contract provides generally that 'The contract price . . . of the work shall include full compensation for all costs incurred.'(s 9(b).) More specifically, with respect to the subject of taxes, section 4(h) states:

'Except as otherwise provided in the Special Provisions, the contract prices shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by federal, state, or local government, and no tax exemption certificate or any other document designed to exempt the Contractor from payment of tax will be furnished to the Contractor by the Department.'

correct. In view of this determination, it ssary to pass upon the Department's conte ed by its appeal that a release signed by Wes overing all claims and demands arising under an virtue of the contract, included its claim for add al compensation on account of the enhanced sale nd use tax rate. The court, therefore, expresses no opinion on this question. [FN4]

n view of the fact that this question become moot and this court has not approved the trial court's decision in this respect, the judgment will be modified to eliminate it.

CT Position Paper Appendix C-6

CALTRANS POSITION
(CONTINUED)
APPLICABLE LAW

this interpretation being placed upon it, section 36 of Statutes of 1972 was amended to clarify its applica-

tion of the work.'(s 7(b).) Such changes *350 may result in additional compensation whenever they can-

To support its claim for extra compensation, Western relies upon the provisions of the contract relating to 'changes in the contract.' Section 7 of the contract deals with this subject matter. An examination of its provisions in this respect, however, indicates clearly that the changes for which an adjustment in compensation may be authorized are only those which affect the amount or quality of the work.

The trial court construed the construction contract as not providing for additional compensation on account of the increased tax burden. We agree.

[4] The contract provides generally that 'The contract price . . . of the work shall be full compensation for all costs incurred.'(s More specifically, with respect to the subject taxes, section 4(h) states:

'Except as otherwise provided in the Special Provisions, the contract prices shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by federal, state, or local government, and no tax exemption certificate or any other document designed to exempt the Contractor from payment of tax will be furnished to the Contractor by the Department.'

To support its claim for extra compensation, Western relies upon the provisions of the contract relating to 'changes in the contract.' Section 7 of the contract deals with this subject matter. An examination of its provisions in this respect, however, indicates clearly that the changes for which an adjustment in compensation may be authorized are only those which affect the amount or quality of the work.

[5] The engineer is authorized to order 'such changes in the contract as are required for the proper comple-

The trial court's interpretation of the construction contract is therefore correct. In view of this determination, it is not necessary to pass upon the Department's contention raised by its appeal that a release signed by Western, covering all claims and demands arising under and by virtue of the contract, included its claim for additional compensation on account of the enhanced sales and use tax rate. The court, therefore, expresses no opinion on this question. [FN4]

FN4. In view of the fact that this question has become moot and this court has not approved the trial court's decision in this respect, the judgment will be modified to eliminate it.

Claimed Impairment of Contract

Western contends that the imposition of the additional tax burden upon it in combination with the denial of its claim for further compensation unconstitutionally impairs the State's obligation under its contract. The constitutional provisions relied on are: (a) Article 1, section 10 of the Constitution of the United States, (b) the due process clause of the Fourteenth Amendment, and (c) Article 1, section 16 of the Constitution of California.

Caltrans Standard Specifications Section 4-1.03

- Only changes that affect the amount or quantity of the work qualify for adjustment in compensation.

CT Position Paper Appendix C-6

CALTRANS POSITION (CONTINUED) APPLICABLE LAW

this interpretation being placed upon it, section 36 of Statutes of 1972 was amended to clarify its applicability to both sales and use taxes but without in any respect modifying the description of personal property exempted. (Stats.1973, ch. 208, s 61.)

[3] Both the language and the legislative history, therefore, strongly support the interpretation urged by the Board. In addition, section 6376 is a tax exemption provision. As such, it is to be narrowly construed. (Santa Fe Transp. v. State Board of Equal., 51 Cal.2d 531, 539, 334 P.2d 907; Good Humor Co. v. State Board of Equal., 152 Cal.App.2d 873, 879, 313 P.2d 640.)The trial court's interpretation of it was therefore correct.

Additional Compensation Under the Contract

The trial court construed the construction contract as not providing for additional compensation on account of the increased tax burden. We agree.

[4] The contract provides generally that 'The contract price . . . of the work shall include full compensation for all costs incurred.'(s 9(b).) More specifically, with respect to the subject of taxes, section 4(h) states:

'Except as otherwise provided in the Special Provisions, the contract prices shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by federal, state, or local government, and no tax exemption certificate or any other document designed to exempt the Contractor from payment of tax will be furnished to the Contractor by the Department.'

To support its claim for extra compensation, Western relies upon the provisions of the contract relating to 'changes in the contract.' Section 7 of the contract deals with this subject matter. An examination of its provisions in this respect, however, indicates clearly that the changes for which an adjustment in compensation may be authorized are only those which affect the amount or quality of the work.

[5] The engineer is authorized to order 'such changes in the contract as are required for the proper comple-

tion of the work.'(s 7(b).) Such changes *350 may result in additional compensation whenever they cannot 'be fairly and reasonably paid for at contract prices.'(s 7(e).) A change in the tax rate does not qualify under this provision because it has nothing whatever to do with 'proper completion of the work.'

Provision is also made for notification of 'changed conditions' which, if they 'materially increase or decrease the costs of any portion of the work,' may be the subject of an adjustment to compensation. (s 7(h).) However, the kinds of changed **234 conditions provided for are (1) 'Subsurface or latent physical conditions at the site of the work differing materially from those represented in this contract,' and (2) 'Unknown physical conditions at the site of the work of an unusual nature differing materially from those ordinarily encountered.'A change of the tax rate does not fall into either of these categories.

The trial court's interpretation of the construction contract is therefore correct. In view of this determination, it is not necessary to pass upon the Department's contention raised by its appeal that a release signed by Western, covering all claims and demands arising under and by virtue of the contract, included its claim for additional compensation on account of the enhanced sales and use tax rate. The court, therefore, expresses no opinion on this question. [FN4]

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Claimed Imp

Western contends that
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States, (b) the due pro
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Caltrans Standard Specifications Section 4-1.03

- Specifies kinds of changed conditions that warrant adjustment in compensation.
- A change of the tax rate does not fall into these specified conditions.

this interpretation being placed upon it, section 36 of Statutes of 1972 was amended to clarify its applicability to both sales and use taxes but without in any respect modifying the description of personal property exempted. (Stats.1973, ch. 208, s 61.)

[3] Both the language and the legislative history, therefore, strongly support the interpretation urged by the Board. In addition, section 6376 is a tax exemption provision. As such, it is to be narrowly construed. (Santa Fe Transp. v. State Board of Equal., 51 Cal.2d 531, 539, 334 P.2d 907; Good Humor Co. v. State Board of Equal., 152 Cal.App.2d 873, 879, 313 P.2d 640.)The trial court's interpretation of it was therefore correct.

Additional Compensation Under the Contract

The trial court construed the construction contract as not providing for additional compensation on account of the increased tax burden. We agree.

[4] The contract provides generally that 'The contract price . . . of the work shall include full compensation for all costs incurred.'(s 9(b).) More specifically, with respect to the subject of taxes, section 4(h) states:

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The trial court's interpretation of the construction contract is therefore correct. In view of this determination, it is not necessary to pass upon the Department's contention raised by its appeal that a release signed by Western, covering all claims and demands arising under and by virtue of the contract, included its claim for additional compensation on account of the enhanced sales and use tax rate. The court, therefore, expresses no opinion on this question. FN4

FN4. In view of the fact that this question has become moot and this court has not approved the trial court's decision in this respect, the judgment will be modified to eliminate it.

Claimed Impairment of Contract

Western contends that the imposition of the additional tax burden upon it in combination with the denial of its claim for further compensation unconstitutionally impairs the State's obligation under its contract. The constitutional provisions relied on are: (a) Article 1, section 10 of the Constitution of the United States, (b) the due process clause of the Fourteenth Amendment, and (c) Article 1, section 16 of the Constitution of California.

CALTRANS POSITION
(CONTINUED)
APPLICABLE LAW

Additional Compensation Under the Contract

The trial court construed the construction contract as not providing for additional compensation on account of the increased tax burden. We agree.

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CALTRANS POSITION (CONTINUED)
APPLICABLE LAW

[6][7] Inasmuch as Western received the full fixed-price specified in its contract for the work, this contention amounts to the assertion that any increase in the tax burden incident to performance constituted an impairment of the obligation of its contract. Western concedes that an identical contract between it and a private owner would not be unconstitutionally impaired by any such increase. That concession is clearly required by well established case authority. In National Ice, etc. Co. v. Pacific F. Exp. Co., 11 Cal.2d 283, 79 P.2d 380, the application of the original sales tax law to a sale *351 at a fixed price entered into before its enactment, though it imposed a substantial burden upon the retailer, was held not to impair the contract. The court said: 'the principle of law is well established that the existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the state to levy or to impose a tax which may adversely affect the financial interests of either or any of the parties . . ..' (11 Cal.2d at p. 294, 79 P.2d at p. 385.)A recent statement of this rule appears in Coast Bank v. Holmes, 19 Cal.App.3d 581, at page 596, 97 Cal.Rptr. 30, at page 39, the general principle announced in the cases is that both existing law and 'the reservation of the essential attributes of continuing governmental power' are 'read into' all contracts 'as a postulate of the legal order.'

Western maintains that no such reservation may be 'read into' a public contract. It relies in this connection upon two decisions of the United States Supreme Court and one from the First Circuit dealing with public contracts, and a line of California cases concerned with the pension rights of public employees.

Murray v. City of Charleston, 96 U.S. 432, 24 L.Ed. 760 (1877), held unconstitutional an ordinance whereby, after issuance of interest-bearing municipal obligations, the city levied a general personal property tax which applied to them and empowered itself to deduct the tax from the interest payments. The opinion of the court, however, makes it clear that it was the provision for automatic collection from the particular class of taxpayer (creditors of the city) that invalidated the law. The provision for deduction of the tax from the interest payment was described as 'a change of the express stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements,' (96 U.S. at p. 444) and the court made it clear that the interest once paid could have been **235 taxed if it constituted properly having a situs within the city.[5]

[5] The holder of the municipal obligation in this case was a resident of Germany, and the court obviously did not think that there was any taxable asset in Charleston.

A more modern Supreme Court decision relied upon by Western is El Paso v. Simmons (1965) 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446. This case also involved legislation diminishing the rights of a party to a public contract, but in this case the legislation was upheld: the time within which a defaulting purchaser under a contract to buy public land could reinstate his contract, which had been unlimited, was cut to five years. Western's contention that the sole basis for upholding this impairment was that it constituted 'nothing but a modification of the remedy' is incorrect. The court expressly stated that it did not base its decision on that ground *352 but rather upon the proposition that 'it is not every modification of a contractual promise that impairs the obligation of contract under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause.'(379 U.S. at pp. 506-507, 85 S.Ct. at 582.)The principle found to govern the case was stated by the court as follows:

'. . . The Blaisdell opinion, (Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413) which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that '(n)ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . This principle of harmonizing the constitu-

[6][7] Inasmuch as Western received the full fixed-price specified in its contract for the work, this contention amounts to the assertion that any increase in the tax burden incident to performance constituted an impairment of the obligation of its contract. Western concedes that an identical contract between it and a private owner would not be unconstitutionally impaired by any such increase. That concession is clearly required by well established case authority. In National Ice, etc. Co. v. Pacific F. Exp. Co., 11 Cal.2d 283, 79 P.2d 380, the application of the original sales tax law to a sale *351 at a fixed price entered into before its enactment, though it imposed a substantial burden upon the retailer, was held not to impair the contract. The court said: 'the principle of law is well established that the existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the state to levy or to impose a tax which may adversely affect the financial interests of either or any of the parties . . ..' (11 Cal.2d at p. 294, 79 P.2d at p. 386.)A recent statement of this rule appears in Coast Bank v. Holmes, 19 Cal.App.3d 581, at page 596, 97 Cal.Rptr. 30, at page 39, the general principle announced in the cases is that both existing law and 'the reservation of the essential attributes of continuing governmental power' are 'read into' all contracts 'as a postulate of the legal order.'

Caltrans Position (Continued)
Sovereign Act

- State of California cannot be held liable under a contract for sovereign acts.
- State of California is to be treated as a private party under the contract.
- As long as the act is public and general, it cannot be construed as to alter or obstruct a particular contract.
- Sales tax increase is a sovereign act for the public good.

CALTRANS POSITION (CONTINUED)
APPLICABLE LAW

Statute which exempted from increase in sales and use taxes "materials" and "fixtures" in the sale, storage, use or other consumption of the material and fixtures which were obligated pursuant to an engineering construction project contract entered into for a fixed price prior to August 1, 1967, did not provide an exemption from the increase in sales and use taxes with respect to construction equipment and supplies utilized in performance of contract with the Department of Water Resources to build dam. West's Ann.Rev. & Tax.Code, § 6376.

[3] Taxation 371 ⟸3638

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General
371k3638 k. In General. Most Cited Cases
(Formerly 371k1220)

Taxation 371 ⟸3639

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General
371k3639 k. Use Tax. Most Cited Cases
(Formerly 371k1220)
Statute which exempted from increase in sales and use taxes "materials" and "supplies" if such materials and supplies were obligated pursuant to an engineering construction project under contract entered into for fixed price prior to August 1, 1967, was a tax exemption provision which was to be narrowly construed. West's Ann.Rev. & Tax.Code, § 6376.

[4] States 360 ⟸104

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases
Where contract with Department of Water Resources to build dam provided that the contract price included full compensation for all taxes which the contractor is required to pay, whether imposed by federal, state, or local government, contract further provided that the contract price of the work would include full compensation for all costs incurred and the provisions of the contract relating to "changes in the contract" pertained only to those which affected the amount or quality of the work, contractor was not entitled to additional compensation on account of increased tax burden which resulted from increase in state sales and use taxes. West's Ann.Rev. & Tax.Code, § 6376.

[5] States 360 ⟸104

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases
Provision of contract with Department of Water Resources for dam construction which authorized engineer to order "such changes in the contract as are required for the proper completion of the work" and which permitted payment of additional compensation whenever changes cannot be fairly and reasonably paid for at contract prices did not permit contractor to recover additional compensation on account of increased sales and use tax burden where the change in the sales tax rate had nothing whatever to do with "proper completion of the work." West's Ann.Rev. & Tax.Code, § 6376.

[6] Constitutional Law 92 ⟸2718

92 Constitutional Law
92XXII Obligation of Contract
92XXII(B) Contracts with Governmental Entities
92XXII(B)2 Particular Issues and Applications
92k2717 Taxation
92k2718 k. In General. Most Cited Cases
(Formerly 92k137)
Where contractor received from the Department of Water Resources the full fixed price specified in the contract for construction of dam, increase in the sales

Contracts. Most Cited Cases
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CALTRANS POSITION (CONTINUED)

APPLICABLE LAW

39 Cal.App.3d 341
39 Cal.App.3d 341, 114 Cal.Rptr. 227
(Cite as: 39 Cal.App.3d 341, 114 Cal.Rptr. 227)

Page 9

tional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' 290 U.S., at 434-435, 54 S.Ct., at 238-239. Moreover, the 'economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.' Id., at 437, 54 S.Ct., at 239). The State has the 'sovereign right . . . to protect the . . . general welfare of the people . . .. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary'.' East New York Savings Bank v. Hahn, 326 U.S. 230, 232-233, 66 S.Ct. 69, 71, 90 L.Ed. 34. As Mr. Justice Johnson said in Ogden v. Saunders, '(i)t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.' 12 Wheat. 213, 291, 6 L.Ed. 606.

'Of course, the power of a State to modify or affect the obligation of contract is not without limit. '(W)hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, Nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt As its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." (Emphasis added.) (379 U.S. at pp. 508-509, 85 S.Ct. at pp. 583.)

**236 [8] Under the holding of the court in El Paso, the application of the tax *353 increase to Western was clearly valid. There is absolutely nothing in the record to suggest that the motive of the Legislature was other than that of raising general revenue to meet public need. Contractors under public contracts were not singled out for less favorable treatment than that accorded other contracting parties. They were in fact given a dispensation along with all others who had fixed-price construction contracts. Giving, as we must, 'respect (to) the 'wide discretion on the part of the legislature in determining what is and what is not necessary" this court can only conclude that the policy of this legislation was legitimate and it is therefore valid.

Under circumstances virtually identical to those presented by this appeal, the Court of Appeals in John McShain, Inc., v. District of Columbia, 92 U.S.App.D.C. 358, 205 F.2d 882, upheld the application of the District's sales and use tax to a contractor with an antecedent fixed-price construction contract with the District. In that case the court did not have the benefit of the subsequent opinion in El Paso v. Simmons. Its reasoning, however, fits exactly the criteria stated by the Supreme Court. In upholding the validity of the tax, the court said:

'. . . Nor does the statute impair a contractual obligation. The imposition of a new tax, or an increase in the rate of an old one, is one of the usual hazards of business enterprise: seldom, if ever, does such an event impair the obligation of a pre-existing contract. See Wiseman v. Gillioz, 1936, 192 Ark. 950, 96 S.W.2d 459. The Contract Clause, of course, is a limitation on state rather than federal action. Nevertheless, a measure of protection against contract impairment by the federal government is given by the Fifth Amendment. Perry v. United States, 1935, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912; Lynch v. United States, 1934, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434. But Congress was not here seeking to repudiate or render profitless petitioner's contracts with the United States and the District of Columbia. Rather, it sought additional tax revenues for the District, through a general statute affecting petitioner no more severely than others who made purchases and sales. Cf. O'Malley v. Woodrough, 1939, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289. There was no deprivation of petitioner's property without due process of law. . . .' (205 F.2d at pp. 883-884.)

It is unnecessary to discuss the public pension cases relied upon by Western. They involve legislation directly modifying the obligations of public contracts rather than incidental burdens created by general legislation.[FN6]

FN6. The same is true of the opinion of the First Circuit in People of Porto Rico v. Havemeyer, 60 F.2d 10, also cited by appellant.

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CALTRANS POSITION (CONTINUED)

APPLICABLE LAW

- California Constitution denies Caltrans the authority to pay for the increased sales tax:

  Article 4, Section 17

  "*The legislature has no power to grant, or to authorize a city, county, or other public body to grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part,* ***OR*** *to authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law."* (emphasis added)

Caltrans Position (Continued)
Applicable Specifications

Standard Specifications:

- 4-1.03, "Changes"
  - Allows the Department to make changes to the plans and specifications
  - Compensates the contractor only for changes ordered by the Department.
  - No contractual requirements have changed

Caltrans Position (Continued)
Applicable Specifications

Standard Specifications:

- 4-1.03(C), "Changes in Character of Work"
  - Requires an ordered change to the plans or specifications ... and there was none.
- 4-1.03(D), "Extra Work"
  - While the contract provides for additional compensation for new and unforeseen "work," it does not provide for additional compensation for everything that is new and unforeseen
  - A change in sales tax is not a change to the work.

Caltrans Position (Continued)

Applicable Specifications

Standard Specifications: (Continued)

- 7-1.01, "Laws to be Observed"
  - Requires the contractor to comply with the law.
  - The Contractor is required to protect and indemnify the state from violation of any law.
  - The Contractor is required to report to the Engineer any discrepancy between the law and the specifications.

Caltrans Position (Continued)
Applicable Specifications

Standard Specifications: (Continued)

- 7-1.03, "Payment of Taxes"

> **7-1.03 PAYMENT OF TAXES**
>
> The contract prices paid for the work shall include full compensation for all taxes which the Contractor is required to pay, whether imposed by Federal, State or local government, including, without being limited to, Federal excise tax. No tax exemption certificate nor any document designed to exempt the Contractor from payment of any tax will be furnished to the Contractor by the Department, as to any tax on labor, services, materials, transportation, or any other items furnished pursuant to the contract.

- 9-1.02, "Scope of Payment"
  - The contractor shall accept the compensation provided in the contract as full payment for furnishing all labor, materials, tools, equipment and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contract.

Caltrans Position (Continued)
Applicable Specifications

- 9-1.02, "Scope of Payment" (Cont.)
  - Contractor is responsible for risks of every description connected with the prosecution of the work
  - Many contractual risks exist – Only some are allowed adjustments in compensation under this contract
  - No specific exemption for risk of changes in the State's sales tax laws

Caltrans Position (Continued)
Wage Order 16

- Dispute is not equivalent to WO 16
- No effect on production and progress
- No effect on manner of work or means & methods
- Payment for WO 16 claims part of negotiated global settlements
- Arbitration ruling is not Case Law

SUMMARY

The Contractor's claim has no merit based on the following:

- The dispute arose from an event that is outside the contract.
- The Department has not breached or changed the contract.
- This increase in sales tax has no effect on the work.
- AB 3 was a revenue-generating bill – lack of an exemption was intentional.
- Construction Industry recognized that neither State laws or State contracts have provisions for payment of tax increases which is why they tried to secure an exemption via AB 1523.

SUMMARY (CONTINUED)

- California case law supports the Department's position.
- The Department has no legal authority to pay for these increased costs and cannot legally write a change order to pay for this claim.
- The contract specifically precludes the Department from issuing any document that would exempt the Contractor from paying any taxes.

THE KEY QUESTION WITH REGARD TO THIS DISPUTE IS:

If the California Legislature passes a law that increases the statewide sales tax, is the Department of Transportation required to provide additional compensation to its Contractors for this increase?

Contractually and legally, the answer is NO.

Issues

2. Does the contract between Western and the Department provide for additional compensation to Western equal to the increased tax burden borne by it?

Additional Compensation Under the Contract

The trial court construed the construction contract as not providing for additional compensation on account of the increased tax burden. We agree.

Western Contracting Corporation v. State Board of Equalization (1974) 39 Cal.App.3d 341